

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





ORIGINAL **76-7256**

## United States Court of Appeals

For the Second Circuit.

BP/s

MHG ENTERPRISES, INC., JAY PLAYLAND CORP., I. G. AMUSEMENT CORP., G & G RIDE CORP., J. M. P. ENTERPRISE, INC., RON LAMBARDI & GLEN PERRY d/b/a EASTERN AMUSEMENT, THE GREAT ADVENTURE AMUSEMENT PARK, INC., ONASSIS AMUSEMENTS, INC., MICHAEL ESPOSITO d/b/a AMERICAN ZOO, LOUIS ROMANO d/b/a PONY WHEEL, E. B. ANDERSON d/b/a ANDERSON AMUSEMENTS, APPOLLO AMUSEMENTS, INC., R. M. J. AMUSEMENTS, INC., K & J AMUSEMENTS, INC., RENNEBECK AMUSEMENT SERVICE CO. LTD.,  
*Plaintiffs-Appellants,*

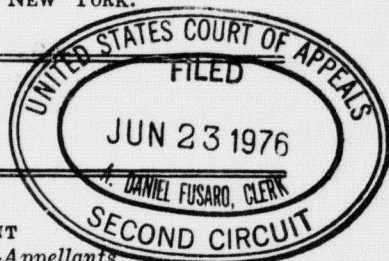
*against*

NEW YORK CITY PUBLIC DEVELOPMENT CORPORATION,  
THE CITY OF NEW YORK, and THE SHERIFF OF THE  
CITY OF NEW YORK,

*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK.

### APPENDIX.



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# United States Court of Appeals

FOR THE SECOND CIRCUIT.

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MHG ENTERPRISES, Inc., JAY PLAYLAND CORP., I. G. AMUSEMENT CORP., G & G RIDE CORP., J. M. P. ENTERPRISE, Inc., RON LAMBARDI & GLEN PERRY d/b/a Eastern Amusement, THE GREAT ADVENTURE AMUSEMENT PARK, Inc., ONASSIS AMUSEMENTS, Inc., MICHAEL ESPOSITO d/b/a American Zoo, LOUIS ROMANO d/b/a Pony Wheel, E. B. ANDERSON d/b/a Anderson Amusements, APPOLLO AMUSEMENTS, Inc., R. M. J. AMUSEMENTS, Inc., K & J AMUSEMENTS, Inc., RENNEBECK AMUSEMENT SERVICE CO. Ltd.,

*Plaintiffs-Appellants,*

*against*

NEW YORK CITY PUBLIC DEVELOPMENT CORPORATION, THE CITY OF NEW YORK, and THE SHERIFF OF THE CITY OF NEW YORK,

*Defendants-Appellees.*

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## Relevant Docket Entries.

Date	Proceedings
4/30/76	Complaint filed. Summons issued.
4/30/76	By Bramwell, J.—Order to Show Cause ret. 5/7/76 at 10:00 AM before Hon. Mark A. Costantino why an order should not be made directing the defts to restore to plntffs possession of premises described etc. filed.
5/ 7/76	Notice of cross motion ret. 5/7/76 at 10:00 AM for an order dismissing plntffs' action vacating a T.R.O. etc. filed.
5/11/76	Amended Complaint filed.



*Relevant Docket Entries*

- 5/12/76 Pltffs' reply memorandum of law filed with affidavit of Harold Glantz filed.
- 5/13/76 Before Costantino, J.—Case called—Order to Show Cause & Temporary Restraining Order, etc.—Motion argued—Decision reserved.
- 5/21/76 Affidavit of R. Burnstein filed.
- 5/24/76 Notice of appeal filed. Copy mailed to the C of A.
- 5/26/76 By Costantino, J.—Order vacating the temporary restraining order and dismissing the case filed.
- 5/26/76 Notice of Appeal filed. Copy mailed to C of A.
- 5/26/76 Judgment that defts motion for an order vacating the temporary restraining order and dismissing the action is granted filed.



**Amended Complaint.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

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MHG ENTERPRISES, Inc., JAY PLAYLAND CORP., I. G. AMUSEMENT CORP., G & G RIDE CORP., J. M. P. ENTERPRISES, Inc., RON LAMBARDI & GLEN PERRY d/b/a Eastern Amusement, THE GREAT ADVENTURE AMUSEMENT PARK, Inc., ONASSIS AMUSEMENTS, Inc., MICHAEL ESPOSITO d/b/a American Zoo, LOUIS ROMANO d/b/a Pony Wheel, E. B. ANDERSON d/b/a Anderson Amusements, APPOLLO AMUSEMENTS, Inc., R. M. J. AMUSEMENTS, Inc., K & J AMUSEMENTS, Inc., and RENNEBECK AMUSEMENT SERVICE Co. Ltd.,

*Plaintiffs,*

*against*

NEW YORK CITY PUBLIC DEVELOPMENT CORPORATION, THE CITY OF NEW YORK, and THE SHERIFF OF THE CITY OF NEW YORK,

*Defendants.*

76 Civ. 787 (MC)

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Plaintiffs, by their attorneys, Squadron, Ellenoff & Plesent, amending their complaint as of right, pursuant to Rule 15(a) Fed. R. Civ. P., allege as follows:

**PARTIES**

1. Plaintiffs, MHG Enterprises, Inc., Jay Playland Corp., I. G. Amusement Corp., G & G Ride Corp., J.M.P. Enterprises, Inc., Ron Lambardi & Glen Perry d/b/a Eastern Amusement, The Great Adventure Amusement

*Amended Complaint*

Park, Inc., Onassis Amusements, Inc., Michael Esposito d/b/a American Zoo, Louis Romano d/b/a Pony Wheel, E. B. Anderson d/b/a Anderson Amusements, Appollo Amusements, Inc., R.M.J. Amusements, Inc., K & J Amusements, Inc., Rennebeck Amusement Service Co. Ltd., each of whose address is 28-50 Linden Boulevard, Flushing, New York, are condemnees in possession of certain real property located within an area bounded generally by 15th Avenue, Whitestone Expressway, Flushing River, Flushing Bay, 28th Avenue, 127th Street, 25th Road, 128th Street, 25th Avenue and 130th Street and an irregular line north of 15th Avenue between 132nd and 138th Streets in the Borough and County of Queens ("the condemned premises"), which property is part of an urban renewal project known as the College Point Industrial Park Urban Renewal Project II.

2. Defendant, New York City Public Development Corporation ("PDC"), a domestic corporation with its principal offices at 217 Broadway, New York, New York, was created as a quasi-public corporation under the New York Not-For-Profit Corporation Law and is the development agent for the College Point Industrial Park Urban Renewal Project II.

3. Defendant, The City of New York ("the City"), is a municipal corporation which was and is the condemning authority for the College Point Industrial Park Urban Renewal Project II.

4. The Sheriff of the City of New York is sued herein in his official and individual capacity as the agent of PDC and the City to afford plaintiffs complete relief.

*Amended Complaint*

## JURISDICTION

5. The jurisdiction of this Court is invoked pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States, the Civil Rights Act of 1871, 42 U.S.C. Section 1983, and 28 U.S.C. Section 1331 and 1343, in that this is an action to remedy the taking of private property for public use without just compensation or due process of law and to remedy the deprivation by PDC of rights secured to plaintiffs by the Constitution of the United States. The amount in controversy exceeds \$10,000 exclusive of interest and costs.

6. Jurisdiction to award declaratory relief is founded on 28 U.S.C. Section 2201.

7. Venue is properly laid in the Eastern District of New York, in that all the parties are found and are doing business in the County of Queens within the Eastern District of New York.

## AS AND FOR A CLAIM AGAINST ALL DEFENDANTS

8. This claim for declaratory and injunctive relief arises under the Fifth and Fourteenth Amendments to the Constitution of the United States.

9. On or about December 1, 1972 and April 3, 1974 the City, acting for and on behalf of PDC, obtained orders ("the condemnation orders") from the Supreme Court of the State of New York, Queens County, condemning the real property formerly leased and owned by plaintiffs and located within the College Point Industrial Park Urban Renewal Project II. The condemnation orders directed that the compensation which should justly be made to plaintiffs as owners of property located on the condemned premises be ascertained and determined by the Supreme Court without a jury. The City and the Supreme Court acted in seeking and granting the condemnation orders



*Amended Complaint*

pursuant to Section 506 of the General Municipal Law of the State of New York and Title B of Chapter 15 of the Administrative Code of the City of New York.

10. At all times hereafter, and continuing to the date hereof, plaintiffs have remained in possession of the condemned premises as tenants of the City, have continued to conduct their businesses on the condemned premises, have paid rent and taxes to the City and have generally enjoyed the use of their property.

11. On or about September 18, 1974, the City moved the Supreme Court for an order putting it in possession of the condemned premises. Issue was joined on the question of the City's and PDC's need therefor, but no determination of the question was made. On March 10, 1975, plaintiffs agreed to transfer possession of the condemned premises to the City on the understanding and condition that an award of compensation for all fixtures and other compensable property would precede transfer of possession to the City.

12. Thereafter, the City became unable to meet its debts as they became due. Special state legislation enacting a moratorium on the payment of short-term City obligations and imposing stringent restrictions on the City's spending was passed. Neither the fiscal crisis nor the budgetary restrictions it necessitated were known to plaintiffs when they agreed to transfer possession to the City.

13. The defendants have no present need for the condemned premises. On information and belief, the defendants have, since 1972, forced the removal of a number of other condemnees occupying portions of the area condemned for the Industrial Park without utilizing any portion of such property.

*Amended Complaint*

14. Despite their lack of need for the condemned premises and their inability to pay compensation for plaintiffs' property, the City and PDC have obtained from the Supreme Court, New York County, an Order dated March 19, 1976, directing the Sheriff of the City of New York to put the City into possession of the condemned premises. Such Order was obtained without any evidentiary hearing as to whether the City is reasonably capable and certain to make ultimate payment of any award to be rendered.

15. On or about April 8, 1976, at a time when defendants had agreed not to disturb plaintiffs in their possession or use of the premises, PDC's President, Richard K. Bernstein ("Bernstein") maliciously made complaints to the Health and Buildings Department concerning the rides operated by plaintiffs.

16. On or about April 21, 1976, the Department of Relocation of the City of New York, acting at the behest of Bernstein and other employees of PDC, wrongfully refused to pay plaintiffs relocation expenses required by Section 1160-1.0 *et seq.* of the New York City Administrative Code to be paid to them to move their property from the premises. Such refusal is contrary to law, the applicable regulations of the Department of Relocation, and the prior practice of the Department of Relocation with respect to other identically and similarly situated condemnees in possession.

17. On or about April 27, 1976, Ira Duchan, Commissioner of the City's Department of Real Estate, at the special instance of Bernstein and PDC, directed the City's Department of Buildings to refuse renewal of MHG Enterprises, Inc.'s ("MHG") assembly permit.

18. On or about April 29, 1976, the Sheriff of the City of New York, as agent for PDC and the City, dispossessed plaintiffs from the condemned premises.

*Amended Complaint*

19. No compensation has been paid to plaintiffs for the property, the use and enjoyment of which the City and PDC has taken from them; and there is substantial question as to whether the City can or will pay any compensation to plaintiffs. Consequently, plaintiffs have been deprived of due process of law and of property without just compensation. Plaintiffs have no adequate remedy at law.

20. On or about May 4, 1976, the Director of the Department of Real Estate's Bureau of Property Management falsely and maliciously complained of improper practices and threatened MHG with eviction. Upon information and belief, this complaint was made at the instance and request of PDC and Bernstein at a time when PDC, Bernstein and the Director of the Bureau of Property Management knew or should have known that the complaint was without basis in fact and that plaintiffs had been restored to possession of the condemned premises by an Order of this Court.

21. The foregoing acts were carried out by defendants as part of a concerted effort and conspiracy to harass plaintiffs, drive plaintiffs out of business and to take from them their amusements rides and other property worth millions of dollars without just compensation or due process of law.

AS AND FOR A SECOND CLAIM AGAINST ALL DEFENDANTS

22. This claim for declaratory and injunctive relief arises under the Civil Rights Act of 1871, 42 U.S.C. Section 1983.

23. Plaintiffs repeat, reallege and incorporate by reference the allegations of paragraphs 9 through 21.

24. PDC, acting under the color of Section 506 of the General Municipal Law of the State of New York and



*Amended Complaint*

Title B of Chapter 15 of the Administrative Code of the City of New York, and the Sheriff of the City of New York, acting under color of the Order of the New York Supreme Court, Queens County, dated March 19, 1976, as agents of the City, have subjected and are subjecting plaintiffs to a deprivation of their rights to due process of law and to just compensation for property taken for public use, secured by the Fifth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, plaintiffs pray that:

1. This Court directed defendants, preliminarily and permanently, to restore plaintiffs to possession of the condemned premises and enjoin defendants, preliminarily and permanently, from depriving plaintiffs of possession of the condemned premises and the personal property of plaintiffs prior to payment by the City to the plaintiffs of just compensation and relocation expenses therefor;

2. This Court declare that General Municipal Law, Section 506 and Title B of Chapter 15 of the Administrative Code of the City of New York are unconstitutional as they have been applied to plaintiffs herein, in that condemnation of plaintiffs' property and transfer of possession thereof to defendants without prior payment infringe upon plaintiffs' rights under the Fifth and Fourteenth Amendments to the Constitution of the United States; together with costs and disbursements of this action besides such other and further relief as to the Court seems just and proper.

Yours, etc.

SQUADRON, ELLENOFF & PLESENT

Attorneys for Plaintiffs  
Office and P. O. Address  
551 Fifth Avenue  
New York, New York 10017  
By NEAL M. GOLDMAN  
A Member of the Firm

**Order to Show Cause and Temporary Restraining  
Order.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Upon the complaint herein and the affidavit of Harold Glantz, annexed hereto, it is

ORDERED, that the defendants, New York City Public Development Corporation, The City of New York, and the Sheriff of the City of New York show cause before Hon. Mark A. Costantino, convoked pursuant to 28 USC Section 2284, in Room 1, of the United States Courthouse, Cadman Plaza East, Brooklyn, New York on May 7, 1976, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, why an order should not be heard, why an order should not be made herein directing the defendants and each of them to restore plaintiffs to possession of premises described in Paragraph 1 of the Complaint herein and enjoining defendants jointly and severally, their agents, servants, employees, attorneys and all other persons in active concert or participation with them or subject to their control, *pendente lite*, from proceeding in any manner to deprive plaintiffs of possession of such premises; and

It appearing to the Court that defendants are committing acts and are about to commit the acts alleged in plaintiffs' complaint and will continue to do so unless restrained by Order of this Court, that an immediate and irreparable injury, loss or damage is resulting and will continue to result to plaintiffs before notice can be given and the defendants and their attorneys can be heard in



*Order to Show Cause and Temporary Restraining Order*

opposition to the granting of a temporary restraining order, and that plaintiffs have been dispossessed from their property and have been denied access thereto; and it appearing that no security for payment of costs and damages is required; it is further

ORDERED that defendants New York City Public Development Corporation, the City of New York, and the Sheriff of the City of New York, their agents, servants, employees and attorneys and all persons in active concert and participation with them be and they hereby are restrained from denying plaintiffs access to the premises located within an area bounded generally by 15th Avenue, Whitestone Expressway, Flushing River, Flushing Bay, 28th Avenue, 127th Street, 25th Road, 128th Street, 25th Avenue and 130 Street and an irregular line north of 15th Avenue between 132nd and 138th Streets in the Borough and County of Queens, and from preventing plaintiffs from conducting their lawful business on such premises; and it is further

ORDERED, that this order, unless previously revoked by the Court, shall remain in force only until the hearing by Judge Costantino of plaintiffs application for a preliminary injunction; and

It appearing that Henry A. Greene is a qualified person over eighteen years of age and is not a party to or an attorney in this action, and that substantial savings of travel fees and expenses will result from his appointment to serve the summons, complaint, this Order to Show Cause and the papers upon which it is granted herein on the defendants, and that substantial savings in travel fees and expenses will result from such appointment; it is further

*Order to Show Cause and Temporary Restraining Order*

ORDERED, that Henry A. Greene be and he hereby is appointed to serve the summons, complaint, Order to Show Cause and the papers upon which said Order to Show Cause was granted on defendants; and it is further

ORDERED, that the service of this Order to Show Cause, together with copies of the papers upon which it is granted on defendants, New York Public Development Corporation, The City of New York, and the Sheriff of the City of New York, by personal delivery to the Corporation Counsel of New York, on or before May 1st, 1976 at 5:00 o'clock P.M. be deemed sufficient service.

Dated: Brooklyn, New York  
April 30th, 1976

HENRY BRAMWELL  
U. S. D. J.

Issued at Brooklyn, New York  
M. April 30, 1976

**Affidavit of Harold Glantz in Support of Plaintiffs'  
Motion.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,  
County of New York, ss:

HAROLD GLANTZ being duly sworn, deposes and says:

1. I am the President of MHG Enterprises, Inc. ("MHG") one of the plaintiffs in this matter. I am fully familiar with all of the facts herein. I am submitting this affidavit in support of an Application for a Temporary Restraining Order and Preliminary Injunction, pending the trial of this matter.

2. MHG conducts an amusement park operation on premises located in Flushing, New York ("the premises"). The other plaintiffs are licensees and tenants of MHG. A portion of the premises was leased from HGV Associates, a partnership in which I have a 50% interest. (That portion of the premises is hereafter referred to as "the owned land"). The balance of the premises was leased from the City of New York. (That portion of the premises is hereafter referred to as "the City land").

The premises are located within the College Point Industrial Park Urban Renewal Project II area. The College Point Project is being developed for the City of New York by the Public Development Corporation ("PDC"), a quasi public corporation. Title to the premises has been acquired by The City of New York through urban renewal condemnation orders. The order with respect to the City land is dated December 1, 1972, and the order with respect to the owned land is dated April 3, 1974. All of the plaintiffs are condemnees in possession.



*Affidavit of Harold Glantz in Support of Plaintiffs' Motion*

3. In September, 1974, The City of New York commenced writ of assistance proceedings to obtain possession of both the City and the owned land. MHG and the other condemnees in possession objected to the granting of possession on two grounds:

(a) The College Point Project covers 500 acres. There were no committed tenants, progress was being made very slowly and PDC could not demonstrate a need for the premises.

(b) Hearings had not been commenced with respect to the amount of the condemnation awards that would be due to MHG and the other condemnees in possession both for land and fixtures. Pending determination of those awards, plaintiffs could not give up the premises and still meet their financial obligations.

4. In March 1975, the parties consented to an Order, which, on its face, granted The City of New York possession of the City land forthwith and of the owned land on November 1, 1975. However, it was understood by all parties and the Court that the Sheriff of the City of New York would not be directed to put the City into possession of the premises before there was determination by the Court of the amount of the condemnation awards to be received by plaintiffs. The reason for this understanding was explicitly stated in the discussions between the parties leading to the consent order. The amusement rides located on the premises are enormously expensive and most of the amusement rides are the subject of an installment purchase. If possession were granted to the City, this investment would be wiped out and all of the plaintiffs would face bankruptcy, since they would be unable to meet the installment payments. It was contemplated by the parties that the determination by the Court of the amount of the condemnation award would permit the plaintiffs to borrow against the award and satisfy their obligations.

*Affidavit of Harold Glantz in Support of Plaintiffs' Motion*

5. In October, 1975, plaintiffs moved to set aside the Order of Possession for the following reasons:

(a) No compensation award had been rendered. Indeed, there had been no hearing commenced with respect to the owned land or fixtures on the owned land. As to the fixtures on the City land, a hearing had been completed, but no award had been rendered.

(b) The financial crisis of the City of New York had become apparent. Accordingly, plaintiffs objected to delivering possession of the premises until they were assured that the City of New York would be able to make payment of any compensation award.

6. The lower court denied the motion and granted possession to the City of New York as of November 25, 1975. Plaintiffs filed a Notice of Appeal with the Appellate Division and applied for a stay of execution pending appeal. The stay was granted. However, after hearing argument, the Appellate Division unanimously sustained the lower court. An appeal to the Court of Appeals was dismissed *sua sponte* by that Court on April 27, upon the ground that no substantial constitutional question was involved.

7. On April 29, the Sheriff of Queens County, at the direction of PDC, took "token" possession of the premises. An official of PDC, two Deputy Sheriffs and four New York City police officers from the local precinct barricaded all entrances, and threatened to arrest anybody who tried to conduct business on the premises, on the ground of trespass. A policeman on a motor scooter has been assigned to the premises on a round the clock basis.

8. At the most recent hearing before the condemnation judge, representatives of the Corporation Counsel's office stated on the record that they would assist plaintiffs to receive relocation benefits from the City. (Transcript

*Affidavit of Harold Glantz in Support of Plaintiffs' Motion*

pages are annexed). However, on April 21, Deputy Commissioner Deutsch of the Department of Relocation advised counsel to one of the plaintiffs in writing (copy of letter attached) that such benefits would not be available. Today my counsel was advised by an Assistant Corporation Counsel who spoke at the Court hearing that he had participated in the conference at the Department of Relocation, where the decision was made (on the ground of lack of funds) to refuse relocation benefits.

9. Therefore, at this moment, plaintiffs have effectively been put out of business. They have been denied relocation benefits. They have never received a hearing on the question of whether the City will be able and willing to pay any compensation award. They have never received any award. The presumption that the municipal taxing powers will be adequate to provide the necessary funds is contradicted by the financial condition of the City, as reflected in the refusal to pay relocation benefits.

10. In September and October, 1975, when plaintiffs applied to the condemnation judge to set aside the agreement for possession, the City's financial situation was critical. My counsel spoke to various City officials, who were participating in discussions about priority of payment in the event of bankruptcy. There were two points of view—one, that life-saving services should have first priority for payment; and the other that bond and noteholders should have first priority for payment. Everybody agreed that general creditors—including holders of condemnation awards—had the lowest priority. These facts were presented to the condemnation judge and he replied that it was not absolutely certain that the City could not pay so the presumption applied. (Transcript of Appellate Division Record, pp. 95 *et seq.*)



*Affidavit of Harold Glantz in Support of Plaintiffs' Motion*

11. Thereafter, a moratorium was declared with respect to bond and noteholders. The statute declaring a moratorium has been challenged by the Flushing National Bank and the case is now pending in the State Appellate Courts. If Flushing National Bank prevails, the City will be bankrupt and will clearly not be able to pay condemnation awards. The property of plaintiffs will have been physically appropriated without compensation.

12. PDC has dispossessed many other occupants of property in the College Point Industrial Park area. Some of those occupants were tenants of City owned property. On no previous occasion has the Department of Relocation refused to pay moving costs.

13. The April 21st letter from Mr. Deutsch shows copies being sent to Commissioner Kaufman and Mr. Krata of the Department of Relocation, and to only two other persons—Mr. Harris and Mr. Bonaparte of PDC. In fact, PDC has nothing to do with relocation; but PDC and its Executive Director, Mr. Bernstein, has been engaged in a systematic and malicious effort for more than two years to drive plaintiffs into bankruptcy.

14. PDC and Mr. Bernstein have lied continuously about the need of PDC for the premises. In fact, the most recent annual report of the Public Development Corporation, dated June, 1975, indicates that there has been absolutely no progress made in developing College Point Industrial Park during the entire prior year. On the contrary, both Martin Paint Stores, Inc. and Mack Construction Company withdrew during 1974, from proposals to develop portions of the College Park Industrial site. From the beginning, the fact that large portions of the property were available to PDC has made no difference. The effort to remove MHG and the other plaintiffs from the premises has been based on hostility towards the amusement park conducted on the premises; and not on actual need for possession.

*Affidavit of Harold Glantz in Support of Plaintiffs' Motion,*

15. Only two weeks ago, I arrived at my office at the amusement park to find inspectors from three different City departments waiting for me. Without basis whatsoever, Mr. Bernstein complained to those departments that the amusement rides were unsafe. In fact, those rides had been inspected within the previous month by the same departments, and all the rides were approved. Moreover, Mr. Bernstein's complaint was in violation of a commitment which was made to Judge Fuchsberg of the Court of Appeals that no action would be taken while the Court of Appeals was considering the matter.

16. The results of the malicious action of PDC and Mr. Bernstein will be the following:

(a) An amusement park that services hundreds of thousands of City residents, particularly from the Queens and the Bronx, will be closed at the very beginning of the season.

(b) Three Hundred and Fifty full-time summer jobs will be lost in addition to seventy-five year round jobs.

(c) Thousands of dollars in sales taxes and income taxes will be lost to the City at a time of economic crises.

(d) Millions of dollars of amusement rides will be damaged and may have to be abandoned for lack of money to move them.

(e) Plaintiffs will be driven into bankruptcy. My wife and I (who have guaranteed many MHG debts) and other principals of the plaintiffs will have to declare personal bankruptcy.

17. The irreparable injury to plaintiffs is apparent. The fact that there is no adequate remedy at law is clear. It is also plain that an injunction directing that plaintiffs be restored to possession pending the outcome of this case



*Affidavit of Harold Glantz in Support of Plaintiffs' Motion*

will not prejudice the City or PDC. The College Point Industrial Park is a capital budget item of the City and all such items have been deferred.

18. No previous application has been made for the relief requested herein.

WHEREFORE I respectfully request that the relief specified in the Order to Show Cause be granted in all respects.

(Sworn to by Harold Glantz, April 29, 1976.)

20

LETTER FROM HOUSING AND DEVELOPMENT ADMINISTRATION  
TO SAMUEL GOLDSTEIN & SONS, ESQS., ANNEXED TO  
AFFIDAVIT OF HAROLD GLANTZ.



## HOUSING AND DEVELOPMENT ADMINISTRATION

100 GOLD STREET, NEW YORK, N. Y. 10038

ROGER STARR, Administrator

April 21, 1976

Samuel Goldstein & Sons, Esqs.  
217 Broadway  
New York, N. Y. 10007

Re: College Point Industrial Park  
Urban Renewal Stage II, Queens  
K. J. Amusements, Inc., Passat Tropic  
Your File No. 7094

Dear Sirs:

Deputy Commissioner Kaufman has referred your letter dated  
April 14, 1976 to me for a reply.

Your attention is directed to Section 1160-1.0 (a) of the Administrative Code of the City of New York. Section 1160 provides in part that the Commissioner shall have the power and duty "to provide tenant relocation services for tenants of real property acquired for public purposes". Pursuant to Section 2 of the chapter, the Commissioner is specifically divested of the power to expend funds and make payments to tenants of property not acquired for a public purpose.

Your letter indicates that your client, K. J. Amusements, Inc. were tenants of the City of New York prior to condemnation. The power to condemn was apparently exercised to clear title to the premises. In view of these circumstances, the claim of your client, K. J. Amusements, Inc. is denied.

Very truly yours,

Lloyd A. Deutsch  
Deputy Commissioner

LAD:gw

CC: M. Kaufman  
H. Krato  
R. I. Harris  
O. M. Bonaparte

APR 26 1976

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SAMUEL GOLDSTEIN &amp; SONS

### Transcript Before Condemnation Judge.

(38) there. I think the March 15th date could stand and then either with the direction of the Court, with a stipulation or my stating so on the record or a commitment from the Department of Relocation that they will be assisted in every way to remove the fixtures. But to try to say that the March 15th date for some reason should be extended because it is going to take a long time to remove it, I think is clouding the issue.

As far as this 90 day period, I think that could be waived by Relocation and I have seen it waived before. I don't think it takes 90 days to submit bids for moving expenses and I am sure we can work something out with the Department of Relocation or that can be waived by the Commission.

That's really all I have to say, your Honor. I think that your Honor's decision was proper in deciding the March 15th date. I think that is expressly the purpose of the Appellate Division remanding it, not to reopen what the Appellate Division just decided, but merely to set a practical date by which we should be given possession.

\* \* \*

(43) heard the arguments concerning bankruptcy, difficulty of removal, problems of relocation. It heard both sides of the coin. It heard the City's arguments concerning the need which were placed in affidavits.

I think, basically, the March 15th date is an eminently reasonable date without any further proof whatever, based on the stipulation and the nature of the tenure on the land.

Now Mr. Borenstein says that he can work with Relocation. We don't want to physically abandon their amusement park but Mr. Borenstein represented here that he would work with Relocation towards removal of these rides.



*Transcript Before Condemnation Judge*

I think, basically, that they should not be permitted to reopen this amusement park to the public again. We don't want to harm them. We don't want them to abandon their rides, but they should not open to the public again.

The Appellate Division has sent it back and said let's get the mechanics of removal; the City needs it. We have heard your arguments concerning the equities. Now, get to it and

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(50) Mr. Squadron: Your Honor, if we started today and had the Department of Relocation covering us on costs, it would be reasonable for us to remove in four months—and I am not talking about doing business.

The Court: Why can't the question of cost be determined forthwith, relocation costs?

Mr. Squadron: They will not move until they have a final decree from this Court.

Mr. Levy: Your Honor, may I express myself on this point because I spoke to the Department of Relocation yesterday on this issue.

I think one of the factors that has not been presented to the Court is that the claimant has not submitted as of this date to the Corporation Counsel nor to the Department of Relocation a schedule of the items that are being claimed.

The Department of Relocation cannot give any of its benefits until that schedule is submitted.

The Court: Aren't there schedules galore in the record of the condemnation proceedings?

Mr. Squadron: I think you are talking about the owned land.

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(53) just a few facts?

The Court: Is there anything further you want to say, Mr. Levy?

*Transcript Before Condemnation Judge*

Mr. Levy: I believe that's one of the bases.

The Court: You are talking about a schedule and you say that no schedule has ever been submitted to you apart from whatever schedules were submitted in evidence on the trial of the fixtures on the leased land.

Mr. Levy: Correct and that's one of the reasons why the Department of Relocation has been unable to provide any benefits.

If the claimant doesn't tell the Department of Relocation what benefits they are seeking, then they cannot get any benefits from the City.

Mr. Goldstein: Can I respond to that?

The Court: Yes, Mr. Goldstein.

Mr. Goldstein: Incidentally, I was not in my office yesterday. I have been out of the office all day but I am advised by Mr. Glantz who has been in touch with my office that the schedule as of yesterday was served upon the Corporation Counsel's Office, our fixtures on the owned land. It had been in preparation.

(54) The Court: Served when?

Mr. Goldstein: Yesterday. It had been in preparation by Mr. Hurt. The Court is aware from just the prior schedule it is very voluminous, the detail that's supplied and it really had been most difficult to put it together. Mr. Hurt had other commitments and so on but that has now been served.

So far as the Department of Relocation is concerned, even if that schedule had been served prior to this from my understanding and I can't speak for that Department, I don't think it would have changed the situation to any degree because they are taking the same position with respect to the portion where we have the tentative decree with respect to the rides, and I have not spoken to them directly myself. This is hearsay so far as I am concerned. I understand they want a final determination before they act.

*Transcript Before Condemnation Judge*

Mr. Levy: Your Honor, from my previous history with the Department of Relocation, I don't believe final decrees or tentative decrees are that necessary to provide benefits to a (55) relocation party. Anyone who presents the proper papers to the Department of Relocation showing the proper estimates is provided the necessary benefits.

Now, I don't believe the tentative decree or the final decree is a proper issue at all. I expected to have someone here from the Department of Relocation. Unfortunately, the party didn't arrive, but from my knowledge of this area, it would be that the Court wouldn't have this issue before it at all.

The Court: Mr. Levy, you join in what Mr. Borenstein says that the claimants may expect the unqualified cooperation of your office in so far as relocation is concerned?

Mr. Levy: There is no question about that, your Honor. We would help in any way we can on this.

The Court: Does anyone else, whether it be in the guise of argument or suggestions?

Mr. Squadron: I simply want to point out to your Honor that the reason given to us by the Department of Relocation and, as I said, this may run counter to Mr. Levy's experience since his

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**Affidavit of Howard M. Squadron in Support of  
Plaintiffs' Motion.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,  
County of New York, ss:

HOWARD M. SQUADRON being duly sworn, deposes and says:

1. I am a member of the firm of Squadron, Ellenoff & Plesent, attorneys for the plaintiffs in this matter. I am personally familiar with all the facts in this matter. I make this affidavit in support of the Application by plaintiffs for a Temporary Restraining Order and a Preliminary Injunction, pending trial. I also make this affidavit to confirm certain factual information contained in the affidavit of Harold Glantz.

2. In October 1975, I had telephone conversations with the President of the City Council, the Controller and the Corporation Counsel of the City of New York. They confirmed to me the disagreement about priority of payment between life-saving services on the one hand and bond and noteholders on the other. I also learned from those conversations that a petition to the Supreme Court had been prepared by the Corporation Counsel seeking a direction for payment of obligations. That petition was never presented because the immediate crisis was solved by the eleventh hour decision of the Teachers Union to participate in a loan arrangement. However, it was made absolutely clear to me that general creditors—including persons who received compensation awards—would rank very low on the priority list in the event of default by the City.

*Affidavit of Howard M. Squadron in Support of  
Plaintiffs' Motion*

3. Earlier this week I had long telephone conversations with Deputy Commissioner Deutsch of the Department of Relocation and Mr. Borenstein of the Corporation Counsel's office. I was advised that the decision to refuse relocation benefits with respect to the amusement rides and other equipment on the City owned land was reached at a conference attended by representatives of the Department of Relocation, the Corporation Counsel's office and the PDC. It was made clear to me that one of the factors contributing to the decision was the City's lack of funds, since the relocation of large amusement rides and other heavy equipment could cost as much as \$1,500,000.

4. I asked both Mr. Deutsch and Mr. Borenstein whether there was any rationale in the City's position since I had previously been informed that relocation benefits had been paid to other condemnees in the College Point Industrial Park area. Mr. Deutsch said that the condemnation procedure was followed with respect to City land only for the purpose of clearing title; and since the City could not "acquire" its own land, relocation benefits were not appropriate. When I asked whether other condemnees in the area had not also been tenants on City land, Mr. Deutsch said it had been possible that some mistakes had been made in the past. I asked Mr. Deutsch and Mr. Borenstein how they reconciled the City position that the land had not been "acquired", with the position taken by the City in the condemnation proceedings that the amusement rides were not "fixtures". I pointed out that if the land always belonged to the City, any "fixtures" would also belong to the City without payment. Neither Mr. Deutsch nor Mr. Borenstein had any answer.

5. The City has convinced the condemnation judge that the rides located on the City land are not "fixtures" and are therefore not compensable. (The decision of Justice



*Affidavit of Howard M. Squadron in Support of  
Plaintiffs' Motion*

Castaldi dated November 3, 1975). Now the City has taken the position that relocation benefits are not available because the land was not "acquired" at all. Finally, the City has taken physical possession of the land and has prohibited normal business use of the amusement rides. Plaintiffs cannot use the rides and they do not have the money to move the rides. The City has effectively "taken" the rides without compensation.

6. When the Sheriff appeared at the premises on April 29, I called the Corporation Counsel, Mr. Richland. I advised him that my office was preparing papers in this action and that we would be applying to this Court for a Temporary Restraining Order on Friday, April 30. I requested that he have the Sheriff withhold execution for one more day. Mr. Richland flatly refused.

7. It is my opinion that plaintiffs have a meritorious claim that their property has been taken by the City in violation of their constitutional rights. Unless plaintiffs are restored to possession of the premises or at least to the business use of their amusement park rides and equipment, they will be irreparably injured. No remedy at law will be adequate to resolve the damage to their business reputation, or to save them from bankruptcy.

8. We request that Henry A. Greene, an employee of our firm and a licensed process server be designated to serve process in this matter. We respectfully submit that such designation will expedite service of process and will conserve costs.

(Sworn to by Howard A. Squadron, April 30, 1976.)

**Defendants' Notice of Cross-Motion.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

To:

Squadron, Ellenoff and Plesent  
Attorneys for Petitioners  
551 Fifth Avenue  
New York, N. Y. 10017

Please Take Notice, that the undersigned will bring the annexed cross-motion on for hearing before this Court at Room 1, United States Court House, Cadmen Plaza East, Brooklyn, New York on May 7, 1976, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, for an order dismissing plaintiffs' action, vacating a temporary restraining order and for such other relief as this Court deems proper.

W. BERNARD RICHLAND  
Corporation Counsel  
Attorney for Defendants  
Municipal Building  
New York, New York 10007  
566-4329/37

**Affidavit of Leonard Olarsch in Support of Defendants'  
Cross-Motion to Dismiss and in Opposition to Plain-  
tiffs' Motion for a Preliminary Injunction and to Va-  
cate a Temporary Restraining Order.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,  
County of New York, ss:

LEONARD OLARSCH, being duly sworn, deposes and says:

1. I am attorney in the office of the Corporation Counsel, attorney for the City of New York and others, and make this affidavit in opposition to plaintiffs' motion for a preliminary injunction and in support of defendants' cross-motion to dismiss plaintiffs' action and to vacate a temporary restraining order.

2. Defendants basic ground for dismissal of this action is that, as plaintiffs' constitutional claim was raised in and determined by the State Court, plaintiffs are precluded from again raising it in this Court under the doctrine of *res judicata*.

3. Plaintiffs operated an amusement park partly on City-owned land and partly on their own land. A portion of the City land was held by plaintiffs under a 30 day permit and the balance of this City land was occupied by them without permission.

4. In 1972, the City terminated any interest plaintiffs had in the City-owned land by condemning it for a public improvement, and in 1974 also condemned plaintiffs' fee owned land for the same purpose (College Point Industrial Park Urban Renewal Project).



*Affidavit of Leonard Olarsch in Support of Defendants'  
Cross-Motion to Dismiss and in Opposition to Plaintiffs'  
Motion for a Preliminary Injunction and to Vacate a  
Temporary Restraining Order*

5. In September 1974, the City moved in Supreme Court, Queens County, for a Writ of Assistance to compel plaintiffs to remove their amusement rides and surrender possession of the land in order to enable the City of New York, through its agent, the Public Development Corporation (PDC) to proceed with the public improvement for which the land had been acquired by condemnation.

6. On March 10, 1975, plaintiffs agreed, through counsel, by written stipulation with court approval that, *inter alia*, if they were permitted to operate the amusement park through the 1975 season and the City agreed to expedite the trial to determine whether plaintiffs' rides (those located on the former City-owned land only) were unacquired personalty or compensable fixtures and, if fixtures, their value, plaintiffs would remove the amusement rides and surrender possession of the land at the end of the 1975 amusement park season. On the same date a consent order of the Court, embodying the agreement of the parties was entered (Stipulation and Order, Exhs. A & B).

7. The City kept its end of the bargain. Plaintiffs finished out the 1975 amusement park season and the fixture trial concerning the rides on the former city-owned land was had, which trial resulted in a finding by the Court that the amusement rides were portable personal property and, thus, not compensable in condemnation (see Exh. C). Soon after the agreement to vacate was executed, plaintiffs embarked on their convoluted route to somehow escape from their agreement to vacate the premises because they wanted to continue their very profitable business.

*Affidavit of Leonard Olarsch in Support of Defendants'  
Cross-Motion to Dismiss and in Opposition to Plaintiffs'  
Motion for a Preliminary Injunction and to Vacate a  
Temporary Restraining Order*

8. Plaintiffs instant action is just the latest in a long series of attempts to evade their agreement to vacate, in order to continue profitable operations. One of the grounds squarely advanced in the State Courts by plaintiffs to get out of the agreement is the very issue presented at bar, *viz*, that in view of the City's fiscal crisis, casting a doubt on its future ability to pay an award, the City's taking of possession prior to full payment of the award or legal assurance of such payment constitutes a taking without just compensation which is violative of the U. S. Constitution. (We submit herewith, 4 briefs of plaintiffs, 3 to App. Div., 1 to Court of Appeals, marked as one exhibit, Exh. D). Also submitted is the City's brief to the Appellate Division (Exh. E).

9. After having failed to persuade the Supreme Court, the Appellate Division and the Court of Appeals to allow them to void their agreement on the basis of the claimed constitutional violation, plaintiffs brazenly make their appearance in this Court with the self-same issue, blithely ignoring the fact that this claim is squarely precluded under the doctrine of *res judicata* (Exhs. F & G).

10. We will not here recount the myriad stays obtained by plaintiffs, which were obtained in almost every manner imaginable. Reduced to basics, plaintiffs appealed from an order of the Supreme Court granting the City possession on the basis of their agreement to vacate (Order & Stip., Exh. H). The Appellate Division unanimously affirmed the lower court, remanding the proceeding back for the purpose of fixing a new date by which plaintiffs must vacate, which the lower court did (Exh. F; Supreme Court Order, Exh. I).

*Affidavit of Leonard Olarsch in Support of Defendants' Cross-Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Preliminary Injunction and to Vacate a Temporary Restraining Order*

11. Plaintiff filed a Notice of Appeal from the unanimous affirmance of the Appellate Division, which appeal was dismissed by the Court of Appeals, *sua sponte*, on the ground that, contrary to plaintiff's contention in its papers and brief submitted to that Court, "no substantial constitutional question is directly involved." That Court also vacated all existing court ordered and automatic stays as being academic. (Exh. G).

12. At bar, plaintiffs in their complaint allege violation of their rights under the fifth and fourteenth amendments to the U. S. Constitution, invoking this Court's jurisdiction on the basis of 28 U. S. C. §1331 (original jurisdiction on federal question), §2201 (Declaratory Judgment), §1343 (Civil Rights), and 42 U. S. C. §1983 (Civil Rights), which sections might possibly be relevant had plaintiffs not fully raised and had determined in state court, the federal question upon which they posit this court's original jurisdiction.

13. The court in *Thistlethwaite v. City of New York*, 497 F. 2d 339 (2nd Cir., 1974), cert. den. 419 U. S. 1019 (1974), reiterated the settled rule (341):

"that since there is no doubt that state forums can be appropriate for the determination of issues arising under the federal constitution, if an issue is argued before a state tribunal, its resolution at that level carries with it all the usual effects of *res judicata* required by full faith and credit."

*Thistlethwaite* applied this doctrine to a suit brought under 42 U. S. C. §1983, one of plaintiffs' bases of jurisdiction here. See also, *Hutcherson v. Lehtin*, 485 F. 2d 567 (9th Cir., 1973), where *res judicata* was held to bar



*Affidavit of Leonard Olarsch in Support of Defendants' Cross-Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Preliminary Injunction and to Vacate a Temporary Restraining Order*

federal suit under 28 U. S. C. §1343, also relied on by plaintiffs at bar for jurisdiction. Cf. *Lombard v. Board of Education*, 502 F. 2d 631 (2nd Cir., 1974), see also, *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932).

14. In *Daniels v. Thomas*, 225 F. 2d 795 (10th Cir., 1955), cert. den. 350 U. S. 932 (1956), the concept of *res judicata* based on a prior state determination of the constitutional issue, was held to preclude District Court jurisdiction under 28 U. S. C. §2201 (Declaratory Judgment), also relied on here by plaintiffs as a basis for invocation of this court's jurisdiction.

15. Finally, and aside from the issue of *res judicata*, plaintiffs request (under 28 U. S. C. §2281) for adjudication of their entitlement to an injunction by a three judge U. S. District Court, is not authorized under a plain reading of the statute, which authorizes such three judge court to act only to enjoin application of an unconstitutional statute. Plaintiffs do not claim unconstitutionality of a statute, but that a valid statute, when applied to them, results in an unconstitutional deprivation of their property. Under these circumstances a three judge court is not authorized. See, e. g., *Maison v. Confederated Tribe of Umatilla Indian Reservation*, 314 F. 2d 169 (9th Cir. 1963), cert. den. 375 U. S. 829 (1963); and *Phillips v. U. S.*, 312 U. S. 246 (1941), where the Supreme Court said that this section must be strictly and technically applied.

16. Assuming *arguendo* that this court has jurisdiction, and aside from the merits of plaintiffs' constitutional claim, we first discuss plaintiffs' claimed equities, which boil down to an allegation that they will go bankrupt if required to move their amusement rides prior to payment of a condemnation award. Added to this is plaintiffs'

*Affidavit of Leonard Olarsch in Support of Defendants'  
Cross-Motion to Dismiss and in Opposition to Plaintiffs'  
Motion for a Preliminary Injunction and to Vacate a  
Temporary Restraining Order*

claim that they are improperly being denied reimbursement for moving expenses by the New York City Department of Relocation (pls. moving papers, Glantz affid., p. 2-3; Squadron affid., p. 2-3).

17. We first note plaintiffs' failure to inform this court that the City has already made an advance payment of award for the former fee owned land in the sum of \$1,068,712.33. While plaintiffs claim that the land is worth more, a trial has not been had to determine this difference.

18. As to the amusement rides, the condemnation court held them to be personal property unacquired by the City and thus not compensable at all in condemnation (see, Exh. C).

19. With respect to the remainder of the land upon which the amusement park is being conducted, this was owned in fee by the City of New York even prior to the condemnation. Part of it was held under a 30 day permit and part without permission. Although title in condemnation vested in 1972, still plaintiffs will remove their personal property off the City owned land so that it can be used for the benefit of the people of the City.

20. It should be noted that plaintiffs now owe the City over \$120,000 in rent arrears for occupancy of the City land, which, ultimately, will be deducted from the award, if sufficient money remains after satisfaction of many prior liens.

21. The claim of impending bankruptcy is belied by the testimony of Harold Glantz, defendants' principal, at the fixture trial and the condemnation court's findings after trial (See Resp. Br. to App. Div., submitted herewith,

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Motion for a Preliminary Injunction and to Vacate a  
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Exh. E, p. 11-13). With knowledge of impending condemnation "as early as August 1970," plaintiffs "took a calculated risk when they installed their rides with knowledge of the impending condemnation" and "gambled that they would be permitted to retain their rides as part of the overall development of the industrial park" by the City (*id.*).

22. Mr. Glantz, the alleged incipient bankrupt, admitted that, although he knew of the coming condemnation when he installed the rides, "even if I was there two, three years, it would have paid" (*id.*). He has been there more than three years—presumably it has paid. Now he wants yet another year.

23. The City's need for this property is immediate (R. Bernstein, Exec. Director of PDC, affid. Exh. J). Further delay will cause irreparable harm. A \$50 million expenditure has been contracted, and several million dollars already expended for the land's planned use as an industrial park. Presently there is an on-going contract between the City, PDC and Earth Bank Co., Inc., to fill the area which work has been in progress since August 18, 1972, and for which payment has been made up to date.

24. This work has so far progressed that plaintiffs' parcels are next to be filled. In fact, it is exceedingly critical that the subject lands now be filled because the two main drainage ditches serving the College Point area converge on this property. If this land remains unfilled, surrounding land cannot be stabilized and the project for which the City has already expended or is obligated to expend over fifty million dollars cannot proceed. Claimants' possession plainly obstructs this project and, if it continues, will require the City to relet the fill contract at higher prices.



*Affidavit of Leonard Olarsch in Support of Defendants' Cross-Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Preliminary Injunction and to Vacate a Temporary Restraining Order*

25. Certainly, the City's right to complete one of the few remaining public improvements still being actively implemented without incurring prohibitive costs is entitled to greater weight than plaintiffs' desire for one more profitable rent-free season. They have already had at least three, and the City should finally be allowed to use its own property, as directed by the state courts.

26. Plaintiffs' counsels' series of non-sequiturs concerning the City's refusal to pay relocation expenses for removal of personal property is answered as follows. The City will pay only those relocation expenses which plaintiffs are lawfully entitled to. We note that plaintiffs have commenced an Article 78 proceeding in the state court regarding this claim.

27. Finally, a preliminary injunction should not issue, not only because the constitutional claim has obviously been fully adjudicated in the state courts, but also because it lacks merit. The Appellate Division disposed of it in the following terms (Exh. F):

"Although we recognize the City's fiscal problems, *there has been no showing that it is unable or unwilling to fulfill its legal commitment to properly compensate appellants for the property condemned*" (emphasis supplied).

"In *Brewster v. Rogers Co.* (169 N. Y. 73, 80), the Court stated:

"It was settled early in the history of this state that when private property is taken for public use, compensation need not necessarily precede the appropriation; but it was also settled that where payment does not precede appropriation, it must be

*Affidavit of Leonard Olarsch in Support of Defendants' Cross-Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Preliminary Injunction and to Vacate a Temporary Restraining Order*

secure and certain. (*Bloodgood v. Hudson R. R. Co.*, 18 Wend 9). The responsibility of the state or of one of its municipal corporation or political divisions is deemed sufficient.'

"In *Sage v. City of Brooklyn* (89 N. Y. 189), it was held that the full faith and credit of a political division is security for the discharge of a constitutional obligation such as the payment for land appropriated for public use."

23. Plaintiffs' raising of the spectre of City insolvency was held to be insufficient to show that the City is unable or unwilling to pay plaintiffs any award that may become due. Plaintiffs did not make a proper showing before the Appellate Division and they do not make a proper one before this Court. Plaintiffs temporary restraining order should be vacated, their motion for a preliminary injunction, denied and their action should be dismissed.

WHEREFORE, the plaintiffs' motion should be denied, defendants' cross-motion to dismiss this action should be granted and the defendants put back into possession immediately.

(Sworn to by Leonard Olarsch, May 6, 1976.)

**Exhibit A, Annexed to Affidavit of Leonard Olarsch—  
Order of Possession, Dated March 10, 1975.**

At a Special Term, Part IV of the Supreme Court, held in and for the County of Queens, at the Supreme Courthouse, 88-11 Sutphin Blvd., Queens, New York, on the 10th day of March, 1975.

Present:

Hon. Michael A. Castaldi, Justice.

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IN THE MATTER

of

The Application of the City of New York, relative to  
Writs of Assistance required for the Project known as

COLLEGE POINT INDUSTRIAL PARK  
URBAN RENEWAL PROJECT II  
STAGE I, STAGE II and STAGE III

within the area bounded generally by 15th Avenue, Whitestone Expressway, Flushing River, Flushing Bay, 28th Avenue, etc., in the Borough of Queens, City of New York, including title to street areas where the title in fee for such purposes has not been heretofore acquired by the City of New York.

Index No.

14056/72 (Stage I)

3088/74 (Stage II)

6439/74 (Stage III)

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An application having been made by Order to Show Cause dated the 18th day of September, 1974, for an order directing the occupants listed in Schedule "a" annexed hereto to vacate certain premises occupied by them as indicated in Schedule "B" and a stipulation, and



*Exhibit A, Annexed to Affidavit of Leonard Olarsch*

directing the Sheriff of the City of New York to put the City into possession of said premises, title to which previously vested in the City of New York pursuant to the entry of orders of condemnation, entered on December 1, 1972 (Cal. No. 14056/72), April 3, 1974 (Cal. No. 3088/74) and June 24, 1974 (Cal. No. 6439/74) respectively, and said application having been heard on October 9, 1974, November 19, 1974, February 18, 1975 and March 4, 1975,

AND, after reading and filing the Order to Show Cause signed the 18th day of September, 1974; the affirmations of John J. Torrusio, Esq., Assistant Corporation Counsel of the City of New York, dated September 17, 1974 and November 1, 1974; the affidavits of Richard K. Bernstein, sworn to July 16, 1974 and November 1, 1974, all in support of the motion; and the affidavits of M. Robert Goldstein, Esq., of October 8, 1974 and November 14, 1974, of Howard Squadron, Esq., of October 8, 1974 and of Harold Glantz, sworn to October 8, 1974 and November 14, 1974; and after hearing W. Bernard Richland, Corporation Counsel of the City of New York, by John J. Torrusio, Esq., of counsel, on behalf of the City of New York, Morris D. Weintraub, Esq., and Robert I. Harris, Esq., on behalf of the New York City Public Development Corporation; and on behalf of all of the occupants herein in opposition to the application, Samuel Goldstein & Sons, Esqs., appearing herein by M. Robert Goldstein, Esq., of counsel, Howard Squadron, Esq., by Lawrence H. Rogovin, Esq., of counsel, Leopold Kaplan, Esq., and by the consent of the attorneys herein appearing,

AND, upon all of the proof and exhibits submitted to their Court,

AND, upon reading and filing a Stipulation entered into by all of the parties hereto, dated March 10, 1975, and made a part hereof,

*Exhibit A, Annexed to Affidavit of Leonard Olarsch*

Now, on the motion of W. Bernard Richland, Esq., attorney for the City of New York, it is

ORDERED, that the application of the City of New York hereby is granted and the occupants listed in Schedule "A" annexed hereto are directed to vacate the premises forthwith now occupied by them in Blocks 4331, Lots 1 & 21; 4332, Lots 6, 36, 44 & 62; 4334, Lots 50 & 69; 4301, 4302, 4303, and 4304 in College Point Industrial Park in the Borough of Queens, City and State of New York, to the extent that such lands are westerly of a certain drainage ditch coursing northerly and southerly adjacent to said lands; and it is further

ORDERED, that the occupants listed in Schedule "A" annexed hereto, are directed to vacate the premises occupied by them in Blocks 4331, Lot 77; 4332, Lot 1; 4334, Lot 10; 4306, 4307, 4310, 4336, 4337, 4339, 4363 and 4364 in the College Point Industrial Park, in the Borough of Queens, City and State of New York by November 1, 1975, and it is further

ORDERED, that the Sheriff of the City of New York is directed to put the Petitioners into possession of said premises in accordance with this Order, and it is further

ORDERED, that service of a copy of this order with Notice of Entry thereof is hereby waived.

Enter

s/ M. A. C.  
J. S. C.

Granted: March 10, 1975

JOHN J. DURANTE  
Clerk

**Exhibit B, Annexed to Affidavit of Leonard Olarsch—  
Stipulation, Dated March 10, 1975.**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF QUEENS.

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IN THE MATTER

of

The Application of the City of New York, relative to  
Writs of Assistance required for the Project known as

COLLEGE POINT INDUSTRIAL PARK  
URBAN RENEWAL PROJECT II  
STAGE I, STAGE II and STAGE III

within the area bounded generally by 15th Avenue,  
Whitestone Expressway, Flushing River, Flushing Bay,  
28th Avenue, etc., in the Borough of Queens, City of  
New York, including title to street areas where the title  
in fee for such purposes has not been heretofore ac-  
quired by the City of New York.

Index No.

14056/72 (Stage I)

3088/74 (Stage II)

6439/74 (Stage III)

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IT IS HEREBY STIPULATED, CONSENTED AND AGREED to by  
and between the Attorneys for the Petitioners and the  
Respondents in the above entitled application for Writs  
of Assistance, as follows:

WHEREAS, after numerous conferences and hearings held  
by the Court and it being agreed between all counsel and  
the Court at a conference held on March 4, 1975, that a



*Exhibit B, Annexed to Affidavit of Leonard Olarsch*

trial date with respect to the condemnation claim and fixture claim of the appropriate Respondents having been advanced to May 5, 1975;

AND, in respect thereof, the City of New York having agreed to expedite appraisals for said fixtures and equipment for the first phase of the site and to submit such appraisals on or before April 25, 1975.

IT IS FURTHER AGREED as follows:

1. All Respondents who presently occupy and use various parcels of land duly owned and acquired by the City of New York within the College Point Industrial Park in the Borough of Queens within the area described in the above entitled application agree to be bound by the terms of this Stipulation and the Order of Possession herein.
2. Upon entry of the Order of Possession to be signed by this Court in the above entitled application, said Respondents shall discontinue and cease all operations, maintenance and use of any and all facilities lying westerly of a certain drainage ditch coursing northerly and southerly, located primarily in Blocks 4331, 4332, 4334 and in Blocks 4301, 4302, 4303 and 4304 in the College Point Industrial Park in the Borough of Queens of land formerly owned in-rem by the City of New York.
3. In respect of such land, it is agreed that upon entry of said Court Order, one of the Petitioners herein, New York City Public Development Corporation (hereinafter called PDC) and/or its agents are permitted to enter forthwith upon the lands located westerly of the aforementioned described drainage ditch for the purpose of commencing a major landfill program and operation now being performed by PDC within the College Point Industrial Park in the Borough of Queens.

*Exhibit B, Annexed to Affidavit of Leonard Olarsch*

4. It is further agreed that PDC and/or its agents shall not remove or disturb such rides, fixtures and equipment located on the lands hereinabove described westerly of the drainage ditch upon which the Petitioners are granted possession, until after May 5, 1975, the advanced trial date fixed by the Court in respect of the condemnation and fixture claim of the appropriate Respondents.

5. It is further agreed that PDC and/or its agents may have a limited right of entry without further required notice on the lands of Respondent on the easterly bank of said drainage ditch for the purpose of maintenance and clearance of said drainage ditch and that PDC and its agents may bring required equipment onto such easterly side for the purpose of maintenance and clearance of such drainage ditch during the course of performance of the landfill program and operation herein.

6. It is further agreed that the Petitioners herein will provide an area of approximately 80,000 sq. ft. located primarily in Blocks 4336, 4337 and 4339 within the College Point Industrial Park in the Borough of Queens for temporary use as an adjacent parking lot adjacent to an existing parking lot presently used by Respondents in the conduct of their amusement park business to the close of the amusement park season in the Autumn of 1975. Respondents agree to vacate such land without further notice or order upon the close of the amusement park season in Autumn of 1975. Respondents further agree to erect, at their own cost and expense, and to remove, at their own cost and expense, any fencing required for such parking lot and that in any event Petitioners are to bear no cost and expense with regard to the making available of such land in use thereof by Respondents. Respondents further agree to extend their in-



*Exhibit B, Annexed to Affidavit of Leonard Olarsch*

surance and liability coverage to cover the benefit of Petitioners in respect to the use, occupancy and operation of such land made available hereunder.

7. It is further agreed that in respect of such lands occupied by Respondents and used by them in the conduct of their businesses located within the College Point Industrial Park, in the Borough of Queens, that presently and/or formerly used by them in the remainder of Blocks 4331, 4332 and 4334 and in Blocks 4306, 4307, 4308, 4310, 4336, 4337, 4339, 4363 and 4364, that with respect thereto without further notice or order of this Court, that they herewith agree to discontinue and cease operations, maintenance and use of all such facilities and to quit same at the close of the amusement park season in the Autumn of 1975 but in no event later than November 1, 1975. That in consideration thereof, the Petitioner, the City of New York, agrees to expedite and accelerate the completion of all appraisal work in respect of fixtures and equipment located in the areas described in this paragraph and to submit same for the Court's consideration as speedily as possible. Such work is presently in progress. In any event, it is further agreed that PDC shall not remove, disturb or alter such rides, fixtures and equipment until the Petitioner, the City of New York, has submitted such appraisals for fixtures and equipment to the Court and provided copies of such appraisals to Counsel in the condemnation and fixture award case.

8. Respondents acknowledge that PDC, on behalf of the City of New York, in undertaking commencement of a major landfill improvement program upon lands hereinabove described, that said Respondents have elected, at their own risk, to continue their business operations for the remainder of the 1975 amusement park season and herewith agree to waive any and all claims against Petitioners for any disturbance or disruption of such busi-



*Exhibit B, Annexed to Affidavit of Leonard Olarsch*

ness as a result of the landfill and engineering work in progress on lands surrendered by them as described in this Stipulation and the Order of Possession.

9. Respondents further agree and consent to PDC's engineers and/or surveyors to make any necessary survey and bench marks on fixtures and equipment of Respondents for the purposes of making measurements of the landfill installation and Respondents agree to allow the implacement of settlement plates for such purposes.

10. It is further agreed and understood that the Order of Possession of the Court shall be peremptory as against the Respondents herein and said Respondents shall not request, either by Motion, Order to Show Cause or otherwise, any further extension of time to quit said lands under the terms of the Stipulation as hereinabove indicated and as described in the Order of Possession.

Dated: March 10, 1975

New York, New York

Attorney for Petitioner

CITY OF NEW YORK

W. BERNARD RICHLAND

Corporation Counsel

By: John J. Torrusio

Assistant Corporation Counsel

Attorney for Petitioner

NEW YORK CITY PUBLIC DEVELOPMENT

CORPORATION

By: Morris D. Weintraub, Esq.

SAMUEL GOLDSTEIN & SONS

Attorney for all Respondents

By: M. Robert Goldstein, Esq.

**Exhibit C, Annexed to Affidavit of Leonard Olarsch—  
Memorandum Decision, Dated November 3, 1975.**

SUPREME COURT,

QUEENS COUNTY,

Special Term, Part 4.

Dated November 3, 1975

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MATTER OF  
COLLEGE POINT INDUSTRIAL PARK URBAN RENEWAL  
PROJECT II

*vs.*

In the Borough of Queens, City of New York.

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By CASTALDI, J.:

In this condemnation proceeding the City of New York acquired title to certain properties for the College Point Industrial Park Urban Renewal Project. Various claimants in the proceeding seek an award for the value of what they assert are compensable fixtures. For purposes of convenience, the claimants MHG Enterprises, Inc. and its sub-tenants, will be referred to collectively as MHG.

The title vesting date is December 1, 1972.

The Court made the required statutory view on several occasions aided by many photographs of the items in issue.

Claimants contend that all of the appraised items (amusement park rides, equipment and other variously described items) are to be treated as compensable fixtures.

*Exhibit C, Annexed to Affidavit of Leonard Olarsch*

The City urges that none of the amusement rides are compensable in that they do not meet the requisites of "fixtures" as known and defined in the law of eminent domain.

## WHAT IS A FIXTURE?

In *McRea v. Central National Bank of Troy* (66 N. Y. 489), the court restated that the criterion of a fixture is (page 496):

"The union of three requisites First. Actual annexation to the realty or something appurtenant thereto. Second. Application to the use or purpose to which this part of the realty with which it is connected is appropriated. Third. The intention of the party making the annexation to make a permanent accession to the freehold."

The three-pronged test in *McRea* has been consistently followed by the courts and is no less the law today. (See, for example, *Jackson v. State*, 213 N. Y. 341; *Matter of City of New York [Allen Street]*, 256 N. Y. 236; *Marraro v. State of New York*, 12 N. Y. 2d 285; *Rose v. State of New York*, 24 N. Y. 2d 80; *In re City of Buffalo [J. W. Clement Co. Inc.]*, 28 N. Y. 2d 241.)

## THE ISSUES

The related and inter-dependent issues are:

Were the amusement rides annexed by the claimants with the requisite intention "to make a permanent accession to the freehold"?

Are the claimants entitled to be compensated for a substantial loss in value of the amusement rides by reason of their inability to relocate the rides as part of an amusement park venture?



*Exhibit C, Annexed to Affidavit of Leonard Olarsch*

On the issue of compensability of the amusement rides, what effect is to be given to a 30-day lease entered into between the claimants and the City?

The determination of the stated issues requires a detailed recital and consideration of the history and the facts relating to the installation of the claimed fixtures.

### HISTORY; CHRONOLOGY

It appears that proposals for the development of the College Point Industrial Park were discussed publicly as early as 1962.

Two areas of property for the development of the Industrial Park are pertinent to the immediate discussion. One area north of Mill Creek was owned by the City prior to condemnation. The other area south of Mill Creek was owned by private interests. In 1969 MHG acquired from the fee owner a lease covering the area south of Mill Creek on which there was being operated a kiddie park. There is some evidence, unclear and contradictory, that MHG received oral permission from the City in or about 1970 to use the land north of Mill Creek for parking to accommodate the kiddie park customers in exchange for some filling and dredging of Mill Creek by MHG.

In August 1970 the claimants sought the approval of the New York City Public Development Corporation (PDC)\* to the inclusion of the claimants' informal plans for an expanded amusement park with amusement rides as part of the development of the Industrial Park. PDC rejected the proposal.

On March 29, 1971 a written lease was entered into between the city and MHG covering the City-owned prem-

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\*The New York City Development Corporation is the agency vested with the authority and responsibility for the development of the College Point Industrial Park.

*Exhibit C, Annexed to Affidavit of Leonard Olarsch*

ises north of Mill Creek for "the term of one (1) month, commencing on the 1st day of April 1971 and ending on the 30th day of April 1971." There is also a provision that "This lease shall be automatically renewed for a further term of one (1) month unless either party serves upon the other thirty (30) day notice to terminate the lease." The stated rental was \$425 per month. As provided in the lease, the permitted use of the premises was confined to "(a) Front Half—Customer No Charge Parking, (b) Rear Portion—Storage of Trucks & Vehicles Necessary to Conduct Business".

On September 16, 1971, following public hearings, and on January 13, 1972, the Board of Estimate adopted resolutions approving plans for the continuing development of the Industrial Park that encompassed the acquisition by condemnation of privately owned land, including the area in which claimants envisaged an expanded amusement park.

On December 1, 1972 the formal order of condemnation was entered, vesting title in the City.

STATUS OF CLAIMANTS AS OF TITLE VESTING

There is no doubt that as of the title vesting date, claimants were tenants in possession under the month-to-month written lease of March 29, 1971.

The court agrees with claimants' contention that possession by a tenant under a month-to-month lease does not, *per se*, bar an award in condemnation for a fixture claim. Rather, the term of the lease is but one of the factors to be considered with all of the other relevant facts and circumstances in determining an intention of permanency. (*Matter of New York [Allen Street]*), 256 N. Y. 236, relied upon by claimants, is not dispositive of the issue in the case at bar. In *Allen*, the tenant was in possession under a long term lease which would have

*Exhibit C, Annexed to Affidavit of Leonard Olarsch*

expired five months after the date of taking. Under the lease, the tenant had the right to remove his fixtures at the end of the term. In determining the extent to which the fixtures enhanced the value of the realty, the Court of Appeals held that it would not speculate on the possibility that the fixtures might have been severed at the end of the term, thus reducing the then value of the realty. The court, however, was not concerned with the question of an intention of permanence akin to the issue here.

More to the point is *Playland at Huntington, Inc., et al v. State of New York* (n.o.r. Court of Claims, Lengyel, J. Claim No. 50080, dec. June 3, 1972).<sup>\*</sup> In that case, as here, a tenant made a claim for amusement park fixtures owned by him. The tenant was in possession under a 25-year lease which did not expire until March 31, 1987. In making an award to the tenant for the amusement rides, the court made this observation regarding the term of the lease:

"Furthermore, when one considers the leasehold term, there was an obvious intent on the part of the tenants to create a reasonably permanent installation. We believe this to be an important factor in our evaluation of the fixture problem."

So, too, in the case at bar, as already stated, in resolving the fixture problem, the court will consider the monthly tenancy together with the other relevant factors.

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<sup>\*</sup>Although appealed, the decision of the Appellate Division (43 A. D. 2d 775) did not disturb the findings of Judge Lengyel relating to the fixture claims of Playland at Huntington, Inc.



*Exhibit C, Annexed to Affidavit of Leonard Olarsch*

THE AMUSEMENT RIDES

*When Purchased and Installed; City's Approval*

The questions as to when the amusement rides were installed on the property leased from the City, and when the City permitted the use of the rides, bear on the intention of permanent annexation.

From the testimony of Harold Glantz, a principal officer of MHG, it appears that the particular amusement rides, owned by MHG and designated as Item Nos. A1-A10, were purchased in 1971. Three of the rides were new when purchased; the other seven were used rides, being one to eight years old at the time of purchase.

Selig Beagle, Property Manager in the City's Department of Real Estate, testified that he regularly inspected leased property once or twice a month "to see that the people are living up to the terms of their agreement". Mr. Beagle's testimony was contradictory. At one point he stated that he first noticed the presence of rides on the subject property in March or April 1972. Elsewhere in his testimony he indicates that he found the rides on the property "a month or two" after the original 30-day lease of March 29, 1971.

Glantz testified, and the court finds as a fact, that the rides owned by MHG were placed on the property sometime during 1971. In this connection, Glantz further testified that in the late Spring or about the middle of 1971, the City countersigned some applications to the Department of Consumer Affairs for licenses for certain rides on the subject parcel. However, the earliest document in evidence indicating the nature of the rides permitted on the property by the Department of Real Estate is the Rent Advice" issued by the Department in April 1972. That memorandum evidences a modification of the March 1971 lease by increasing the monthly rental,

*Exhibit C, Annexed to Affidavit of Leonard Olarsch*

effective as of April 1, 1972, "Because of Additional Space of Parking Area Now Being Used as Amusement Portable Rides".

In June 1972 MHG again sought the City's approval for permanent amusement facilities, including amusement rides, all as part of the Industrial Park. As distinguished from the August 1970 proposal, this time the proposal of MHG was outlined in a formal "Master Plan" submitted to PDC. The plan was rejected, apparently some time in October 1972 prior to title vesting.

To round out the record, it appears that after the title vesting date there was a proposed lease between the parties prepared by the Department of Real Estate dated January 30, 1973, wherein the rental was set at \$250 per month from May to August\* and \$50 per month from September to April. Paragraph 9h of the lease provides that "Tenant has the right to place portable amusement rides on the property \* \* \*". Although signed by Glantz on behalf of MHG, the lease was never signed by the City because of the indicated opposition of the Public Development Corporation. It may be here pointed out that the lease bears the legend "Lease Not Valid Unless Completely Executed".

*Method of Annexation.*

(1)

Various witnesses testified as to the manner in which the amusement rides were physically affixed or erected. Some of the rides were bolted or fastened or had "foundation footings", so that they would be sufficiently secured for their particular operational purpose. Also,

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\*Somewhat confusing is the fact that the additional rent totaling \$1,000 for the summer months (May to August) was actually paid by Glantz in July 1972.

*Exhibit C, Annexed to Affidavit of Leonard Olarsch*

the rides themselves were bolted by joining the various parts together. Perhaps the most significant testimony came from Glantz. He acknowledged that "all" of the rides "can be taken apart, the difference being the amount of man hours that would be involved in the operation" and that "[T]hey can all be placed in a van or a storage depot".

## (2)

The City argues that the amusement rides were so constructed and affixed that they could be readily installed or removed. In this connection the City points to various applications filed with City agencies wherein the claimants, themselves, describe the rides as "portable".

The City's view is that the "portable" nature of the rides, coupled with claimants' occupancy under a 30-day lease, preclude any intention of permanent annexation. The City points to further evidence inconsistent with an intention of permanency in that as early as December 14, 1970, MHG was advised of the impending condemnation and was told throughout the ensuing period that claimants' plans for the expansion of their amusement park with rides would not be incorporated in the development plan of the Industrial Park.

The court finds that the rides were, in fact, "portable" and "removable" in the sense that they could be dismantled and removed with incidental damage, if any, to the freehold. Indeed, this finding is supported by the testimony of the claimants' principal, Glantz, quoted above. In similar vein, Glantz testified that some of the rides would be dismantled and placed in storage from one season to another. Because of loss of customer appeal, or for other reasons, certain rides would be substituted for or alternated with other rides.



*Exhibit C, Annexed to Affidavit of Leonard Olarsch*

INTENTION OF PERMANENT ANNEXATION; LOSS  
OF SUBSTANTIAL VALUE UPON REMOVAL

Apart from the question as to the method or extent of annexation of the amusement rides, the central theme of claimants' argument is that the rides would lose substantial value if removed, and that intention of permanence will be presumed when there is a loss in value on removal. Claimants point to the holding in *Rose v. State of New York*, 24 N. Y. 2d 80, 86, that New York law also regards as fixtures "those improvements which are used for business purposes and which would lose substantial value if removed."

In the proceeding at bar, the claimed loss of value, which the court finds would in fact be substantial, is occasioned by the inability of the claimants to relocate elsewhere and thence remove the rides to the relocated site. The crucial questions thereby presented are: Who should bear the consequent loss in value of the rides? Shall it be the City or the claimants? Under all of the particular circumstances here obtaining, the court is of the view that the loss must be sustained by the claimants. This conclusion is supported by the pertinent findings of the court based upon a consideration of all of the evidence to recapitulate the findings:

(1) As early as August 1970 MHG knew of the impending condemnation encompassing the very property on which the rides owned by MHG were subsequently installed.

(2) Claimants were tenants on a month to month basis pursuant to the written lease of March 1971. Under the terms of that lease, the use of the leased property was restricted to parking and storage.

(3) Notwithstanding the restricted uses permitted under the lease of March 1971, MHG installed the rides sometime between the Spring and late Fall of 1971.

*Exhibit C, Annexed to Affidavit of Leonard Olarsch*

(4) In April 1972, the Real Estate Department issued its written "Rent Advice", which in effect modified the 1971 lease by increasing the monthly rental of the tenant (MHG) because some of the leased space was "Now Being Used as Amusement Portable Rides".

(5) The amusement rides were in fact "portable" and could be removed without damage to the rides and with only incidental damage, if any, to the freehold.

(6) On various occasions commencing in 1970 right up until the title vesting date (December 1, 1972), MHG sought, by written communications and at personal meetings, to obtain the approval of the City and PDC to the inclusion of MHG's plans for an expanded amusement park with amusement rides as part of the Industrial Park. Claimants' proposals were rejected.

When considered in their totality, the court's findings impel the conclusion that claimants took a calculated risk when they installed their rides with knowledge of the impending condemnation and that their monthly tenancy was subject to cancelation on 30 days notice. Claimants gambled that they would be permitted to retain their rides as part of the over-all development of the Industrial Park. Inasmuch as the rides were "portable", it can be fairly inferred that claimants also gambled to this extent. If their proposals for expanding the amusement park with retention of the rides were rejected and condemnation followed, then claimants would be able to relocate the rides. Claimants lost the gamble. Perhaps the real intent and motivation of the claimants may be gleaned by Glantz's own testimony. When asked about his knowledge prior to December 1, 1972 that condemnation was in the offing, Glantz said that "even if I was there [on the leased property] two, three years, it would have paid". Surely, this is inconsistent with an intention of permanent annexation.

Under all of the related circumstances, is it fair that the condemning authority should pay for the consequent



*Exhibit C, Annexed to Affidavit of Leonard Olarsch*

loss in value of the rides because the time arrived to remove the rides and claimants have been unable to relocate? The court deems the answer to be quite obvious. Compensation for the rides must be denied. The rides belong to claimants.

ITEMS OTHER THAN THE AMUSEMENT RIDES

The proof adduced at the trial centered on the issue of the compensability of the amusement rides. Thus the existing state of the record makes it quite difficult to delineate those items (other than the amusement rides) which are compensable and those which are not compensable.

To aid the court in expediting a determination covering the remaining items, the court asks that counsel for the parties enter into a written stipulation setting forth each of the remaining items with the approximate dates when the items were installed or constructed and the valuation of the experts as to each item or group of related items.

It would seem that counsel should be able to agree as to the compensability of many of the remaining items. Indeed, some items were conceded to be compensable by the City's appraiser in the various segments of his appraisal report. In any event, counsel are to indicate in the stipulation which items they concede are compensable and which are left for determination by the court.

The requested stipulation with any supporting or relevant data is to be submitted to the court on or before November 15, 1975.

The Corporation Counsel may submit an appropriate tentative decree at this time embodying the amusement rides which are the subject of this decision or the submission of a tentative decree may await the determination of the remaining items.

MICHAEL A. CASTALDI  
J. S. C.



**Exhibit D, Annexed to Affidavit of Leonard Olarsch.**

*To be argued by*  
 HOWARD M. SQUADRON, Esq.  
 Time requested for  
 argument—20 minutes

NEW YORK SUPREME COURT  
 APPELLATE DIVISION—SECOND DEPARTMENT

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IN THE MATTER OF THE APPLICATION

*of*

THE CITY OF NEW YORK, relative to Writs of Assistance required for a project known as COLLEGE POINT INDUSTRIAL PARK URBAN RENEWAL PROJECT II within the area bounded generally by 15th Avenue, Whitestone Expressway, Flushing River, Flushing Bay, 28th Avenue, etc., in the Borough of Queens, City of New York, including title to street areas where the title in fee for street purposes has not been heretofore acquired by The City of New York.

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MHG ENTERPRISES, INC., and other condemnees  
 in possession,

*Appellants,*

—against—

THE CITY OF NEW YORK,

*Respondent.*

BRIEF FOR APPELLANTS

SQUADRON, GARTENBERG, ELLENOFF &

PRESENT

*Attorneys for Appellants*

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*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

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*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

NEW YORK SUPREME COURT,

APPELLATE DIVISION—SECOND DEPARTMENT.

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IN THE MATTER OF THE APPLICATION

*of*

THE CITY OF NEW YORK, relative to Writs of Assistance required for a project known as COLLEGE POINT INDUSTRIAL PARK URBAN RENEWAL PROJECT II within the area bounded generally by 15th Avenue, Whitestone Expressway, Flushing River, Flushing Bay, 28th Avenue, etc., in the Borough of Queens, City of New York, including title to street areas where the title in fee for street purposes has not been heretofore acquired by The City of New York.

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MHG ENTERPRISES, INC., and other condemnees

*Appellants,*

—against—

THE CITY OF NEW YORK,

*Respondent.*

---

BRIEF FOR APPELLANTS

STATEMENT PURSUANT TO CPLR 5531

1. The index numbers of the proceedings in the Court below, Supreme Court of the State of New York, County of Queens, are 14056/72 (Stage I), 3088/74 (Stage II), 6439/74 (Stage III).



*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

2. The full names of the original parties are as follows:

(a) *Appellants*

MHG Enterprises, Inc.; Jay Playland Corp.; I. G. Amusement Corp.; G & G Ride Corp.; J.M.P. Enterprises, Inc.; Ron Lambardi & Glen Perry d/b/a Eastern Amusement; The Great Adventure Amusement Park, Inc.; Onassis Amusements, Inc.; Michael Esposito d/b/a American Zoo; Louis Romano d/b/a Pony Wheel; E. B. Anderson d/b/a Anderson Amusements; Appollo Amusements, Inc.; R.M.J. Amusements, Inc.; K & J Amusements, Inc., Rennebeck Amusement Service Co. Ltd.

(b) *Respondent*

The City of New York.

There has been no change in parties.

3. Proceedings below were commenced in the Supreme Court of the State of New York, County of Queens.

4. Condemnation proceedings below were commenced on December 1, 1972, April 3, 1974 and June 24, 1974. The Writ of Assistance proceedings, which are the subject of this appeal, were commenced on September 18, 1974. There are no pleadings in these proceedings.

5. The proceedings below and now before this Court on appeal relate to the application for an Order of possession in the nature of a Writ of Assistance, brought by respondent, the City of New York, seeking possession of certain premises within the College Point Industrial Park Urban Renewal Project II occupied by appellants as condemnees in possession.

6. The appeal by appellants herein is from an Order entered in the Office of the Clerk of Queens County on October 7, 1975, denying motion by appellants to set aside

*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

an Order of possession in the nature of a Writ of Assistance made by the Honorable Michael A. Castaldi, Justice of the Supreme Court, Queens County. Pursuant to CPLR §5517, appellants also appeal to this Court from an Order dated November 19, 1975, made by the Honorable Michael A. Castaldi, Justice of the Supreme Court, Queens County, denying appellants' motion to renew.

7. The appeal is on a full record, which has been reproduced.

MEMORANDUM DECISION BELOW

From the voluminous papers submitted in this long pending application by the City for a writ of assistance, this much is clear. From the outset, the objective of the occupants of the subject premises was two-fold. They sought to remain undisturbed in their possession of the premises for the duration of the amusement park season and until the court decided the condemnation proceeding involving certain amusement rides and other items. Both events have now occurred excepting a determination affecting the "other items". In the decision in the condemnation proceeding rendered simultaneously herewith, the court holds that the amusement rides are not compensable and that they belong to the owners-occupants. Viewed realistically, the court's decision means that the owners must now take such action as they deem appropriate with respect to the rides on the subject premises.

Under all of the circumstances, with emphasis on the practicalities of the situation, the court grants the immediate motion brought on behalf of the affected occupants to the extent of directing that the occupants be given a



*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

further and final stay of execution of any writ of assistance until November 25, 1975.

Settle order.

MICHAEL A. CASTALDI  
J.S.C.

QUESTIONS INVOLVED

The questions involved in this appeal are:

(1) Whether the Court below erred in refusing to vacate the March 10 stipulation and the Orders of possession based on such stipulation and in refusing to direct the City of New York to demonstrate need for immediate possession of appellants' property.

(2) Whether the Court below erred in granting an Order of possession covering all of the premises prior to any determination of the amount of condemnation award and prior to any hearings with respect to the fixtures on the owned land, in view of the understanding of the parties and the commitment of the Court to the contrary.

(3) Whether the granting of an Order of possession directing appellants to vacate certain condemned premises prior to payment therefor, in view of the current financial condition of the City of New York, constitutes a violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, §7 of the New York State Constitution, prohibiting the taking of private property for public use without just compensation.

PRELIMINARY STATEMENT

Honorable Michael A. Castaldi, Justice of the Supreme Court, Queens County, granted respondent an Order of



*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

possession, in the nature of a Writ of Assistance, directing appellants to vacate certain premises occupied by appellants as condemnees in possession. Appellants moved to set aside the Order of possession. By Order dated October 7, 1975, Justice Castaldi denied the motion and directed appellants to vacate the premises on November 1, 1975. Upon motion to renew by appellants, Justice Castaldi denied the motion, but extended the date to vacate to November 25, 1975. Appellants appealed from Justice Castaldi's denial of their motion, and on November 21, 1975, this Court granted a stay pending determination of the appeal.

It is respectfully submitted that, on the law and the facts, respondent is not entitled to possession of the premises at this time; and the Orders of the Court below denying appellants' motion to set aside the Order of possession and motion to renew should be reversed.

**FACTS**

Appellant, MHG Enterprises, Inc. ("MHG"), conducts an amusement park operation on premises located in Flushing, New York. The other appellants are licensees and tenants of MHG (R 119). The premises are part of a larger tract of land designated by the City for the College Point Industrial Park Urban Renewal Project II (the "Project"). The Project is being developed for the City by the New York City Public Development Corporation ("PDC"), a quasi public corporation.

A portion of the premises (the "owned land") was owned prior to condemnation by a partnership affiliated with MHG (R 49-51). The balance of the premises (the "leased land") was leased by MHG from the City (R 49-51). Title to the premises was acquired by the City

*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

through urban renewal condemnation orders—as to the leased land on December 1, 1972; and as to the owned land on April 3, 1974 (R 191).

On September 18, 1974, although there had been no hearing as to the amount of the condemnation award, the City commenced proceedings by Order to Show Cause for possession of the premises (R 190). Between September 18, 1974 and March 4, 1975, numerous affidavits and exhibits were submitted both by appellants and respondent on the question of the City's immediate need for the property. There were several court appearances and argument by counsel before the Court, and on February 18, 1974 (R 191), the Court directed that a hearing be held on March 4, 1975.

Conferences were held in court by counsel on March 4, 1975, and again, after an adjournment, on March 10, 1975. There was participation in some of the conferences by Justice Castaldi and by his secretary, Mr. Wimpfheimer. The Court urged the parties to agree on the question of possession of the premises. Both MHG's principal, Harold Glantz, and MHG's counsel made it clear during such discussions that appellants required funds to make installment payments on various rides and equipment and therefore could only vacate the premises by agreement, at such time as a "bankable" condemnation award was in hand.

Although the discussions were off the record, transcripts of subsequent court hearings confirm that all the parties, and Justice Castaldi, understood the concern of appellants at the time (R 143 et seq.). Indeed, at the court hearing of September 24, 1975 both Justice Castaldi



*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

and counsel for PDC, Mr. Weintraub, stated their recollection of the situation as follows:

The Court:

Well, it is in keeping with what the Court, at least in its inner self, has construed as a promise, that the Court would not sign an order directing the Sheriff to oust the occupants and put the City in possession, or PDC in possession, until the Court had first rendered his decision in condemnation Mr. Weintraub, I thought that was the promise of the Court, and I am going to keep it.

Mr. Weintraub:

Yes. For the record, we have to materially stand by your Honor's decision. (R 144-5).

Mr. Wimpfheimer's notes confirm two other significant points. The City expressed a need for possession of the "west bank", or leased portion of the land—not the entire premises. Also, May 5 was set as a "target date for trial and prompt determination with respect to property located on the leased land." It was agreed absolutely that appellants would operate the rides until May 5 and "after that situation is flexible and may allow further use of the rides if the situation warrants it." If it proved not to be possible to meet the May 5 target date for trial and prompt determination, "the parties may come back into Court." (R 164, 166).

With all of these conditions in mind, the parties, on March 10, entered into a stipulation and consented to an Order apparently granting respondent possession of the leased land as of May 5, but Mr. Wimpfheimer's notes state specifically that appellants' counsel, Mr. Goldstein "even though signing stip. and order entered", understood the situation after May 5 to be "flexible" . . . "may allow further use of the rides if the situation warrants it".



*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

Both the stipulation (R 196, 198) and the Order (R 192) grant possession of the leased land as of May 5. As to the owned land, both documents set a date for possession of November 1, 1975; and the stipulation provides in paragraph 7 that in consideration of such date being agreed to by appellants, the respondent "agrees to expedite and accelerate the completion of all appraisal work in respect of fixtures and equipment (on the owned land) and to submit same for the Court's consideration as speedily as possible." (R 198).

Thus, on March 10, 1975, the parties and the Court agreed that on May 5, 1975 there would be a hearing and determination as to the amount of the condemnation award to be granted for the property on the leased land. They also agreed that appraisals as to the property on the owned land would be provided by respondent sufficiently in advance so that a hearing and determination with respect to the amount of the condemnation award to be granted for such property, could be had before November 1, 1975.\*

To this date there has not been a determination of the amount of any condemnation award for any fixtures—whether located on the leased land or the owned land. There have been no hearings whatsoever with respect to the value of property on the owned land, and the parties have been notified by the Court below that such hearings will not commence before February, 1976.

With respect to the property on the leased land, hearings did commence on May 5, 1975 and continued through the summer. For the first time, in those hearings the City questioned the compensability of the amusement rides, the bulk of the property on the leased land.

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\*These agreements did not affect the question of valuation of the owned land itself—which is owned by a partnership not a party to these proceedings.

*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

On July 16, 1975, while the case was pending and Justice Castaldi was on vacation, PDC instructed the Sheriff of the City of New York to execute the Order of possession based on the March 10 stipulation against the leased land. Appellants obtained an Order to Show Cause from Justice Castaldi at his vacation home why such execution should not be stayed. Justice Castaldi set down August 4, 1975 as the return date, and the transcript of the argument on that day is part of the record (R 76 et seq.). At the conclusion of argument, Justice Castaldi granted a stay of enforcement of the Order of possession with respect to the leased land until October 1, 1975, upon the express ground that, after May 5, "there were subsequent problems insofar as . . . a determination of the condemnation claims by the Court" (R 106) Justice Castaldi stated: ". . . hopefully the Court will render his decisions in the condemnation claims by October 1, 1975"; and rejected PDC counsel's request to treat the decision as "final and peremptory" (R 107-8).

By September 20, Justice Castaldi had indicated informally that it was unlikely that the October 1 date would be met. Accordingly, on September 22, 1975 appellants moved by Order to Show Cause to vacate all prior Orders of possession and to set down the entire question of possession, of both leased and owned land, for an evidentiary hearing (R 109 et seq.). A hearing was held on September 24, 1975, and the transcript of that hearing is included in the record (R 22 et seq.).

Justice Castaldi confirmed the understanding of appellants that a condemnation award was to precede possession with respect to both portions of the premises (R 25-27; 32-3; 40—excerpted in the October 17 affirmation of Mr. Goldstein, R 143-144). Nevertheless, he refused to vacate and set aside the prior Orders of possession but merely modified them by extending the October 1 date



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with respect to possession of the leased land to November 1. Accordingly, Justice Castaldi's Order dated October 7 directed appellants to vacate the entire premises on November 1, 1975.

The financial crisis of New York City was then at its height; and on October 17, 1975, appellants moved to renew their motion to vacate and set aside the Orders of possession on the ground that it would be unconstitutional to take their property without more certain assurance than the City was able to give that just compensation would be paid. On November 3, Justice Castaldi denied the motion to renew and directed appellants to vacate the premises on November 25, 1975.

On the same date, Justice Castaldi rendered a memorandum decision finding non-compensable the amusement rides belonging to appellants located on the leased land (R 201 et seq.). Justice Castaldi's decision expressly distinguishes the amusement rides from "other items", some of which, according to his decision, are compensable and some of which may not be compensable. Notwithstanding the extensive evidence as to value of all items on the leased land which had been submitted by the parties, Justice Castaldi made no determination whatever as to these remaining "other items". Instead, he held as follows:

"It would seem that counsel should be able to agree as to the compensability of many of the remaining items. Indeed, some items were conceded to be compensable by the City's appraiser in the various segments of his appraisal report. In any event, counsel are to indicate in the stipulation which items they concede are compensable and which are left for determination by the court.

The requested stipulation with any supporting or relevant data is to be submitted to the court on or before November 15, 1975." (R 213)



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The parties have been unable to arrive at a stipulation as to compensability. The present situation is that there has been absolutely no finding as to value of any compensable item at all.

Respondent submitted an order to Justice Castaldi directing appellants to vacate the entire premises on November 25th. Appellants submitted an alternative order directing that only the leased land be vacated. Justice Castaldi signed the Order submitted by respondent granting possession of the entire premises (R 13).

In summary, the City has never been required to prove, at an evidentiary hearing, its need for the premises. Hearings have not been commenced as to the amount of condemnation award to cover appellants' property on the owned land. There has not been a finding as to value of a single item of property either on the owned land or on the leased land. Nevertheless, appellants have been directed to remove from the entire premises, together with all property, including huge, expensive amusement rides.

## ARGUMENT

### POINT I

THE COURT BELOW SHOULD HAVE VACATED THE MARCH 10 STIPULATION AND THE ORDERS OF POSSESSION BASED THEREON.

The Court below has applied the written stipulation of March 10 and the order based on that stipulation literally and rigidly. Notwithstanding the Court's own acknowledgment that there was an underlying understanding between the parties, and notwithstanding that such understanding has clearly not been fulfilled, the Court has refused to reopen the stipulation and order, but has merely extended the date for its execution, granting a final extension to November 25.

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It is evident that two critical conditions underlying the stipulation have not been met—there has been no bankable award (indeed there has been no finding of value at all), and there has been no hearing with respect to the property located on the owned land. In the circumstances, it is respectfully submitted that Justice Castaldi should have granted the motion by appellants to vacate and set aside the stipulation and the Orders of possession. His refusal to do so constitutes reversible error.

A party is entitled to have a stipulation set aside in the following circumstances:

(a) Where to enforce the stipulation would be unjust or inequitable and would permit the other party to gain an unconscionable advantage; and

(b) Where the matter has not been terminated and the action continues to be pending; and

(c) Where the parties can be restored to their original position.

*Goldstein v. Goldstein*, 243 App. Div. 268, 276 N.Y.S. 861 (2nd Dept. 1935); *Chase Manhattan Bank v. Porter Flushing Realty Inc.*, 40 Misc. 2d 405, 243 N. Y. S.2d 59 (Special Term, N.Y. County 1963). See also, *In Re Huie v. Payuk*, 39 App. Div. 2d 982, 333 N.Y.S. 2d 251 (3rd Dept. 1974); *Central Valley Concrete Corporation v. Montgomery Ward & Co., Inc.*, 34 App. Div. 2d 860, 310 N.Y.S. 2d 925 (3rd Dept. 1970), *In Re Marrello v. Caputo*, 4 App. Div. 2d 768, 165 N.Y.S. 2d 258 (2nd Dept. 1975). *In Re Siegelack's Estate*, 258 App. Div. 1059, 17 N.Y.S. 2d 747 (2nd Dept. 1940).

In the *Goldstein* case, *supra*, a judgment had been entered by the plaintiff *ex parte* on the basis of a stipulation. Under the terms of the stipulation plaintiff was entitled to enter judgment for the full amount in suit, if the settlement payment terms were not complied with.



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Due to a bank error, one of the settlement payment checks did not clear, and judgment was entered. The judgment creditor claimed that the action was terminated, and that the stipulation of settlement constituted a fixed and definite contract. The lower court accepted this claim. This court reversed and set aside the judgment as follows:

"Generally speaking, under such circumstances the court retains jurisdiction of the action. Whatever the instrument may be called, an agreement or contract, when it is left subject to the action of the court and is the basis of a judgment by the court, then control over it is left to the court. *Kunker v. Kunker*, 230 App. Div. 641, 246 N.Y.S. 118.

The rule in respect to the power and duty of the court to relieve parties from stipulation is well understood. 'Where a party has through inadvertence, mistake or other cause made an admission or entered into a stipulation as to facts which are not true, there is, of course, power in the court to furnish relief in the exercise of sound judicial discretion upon good cause shown and in furtherance of justice.' *Levy v. Delaware, Lackawanna & Western R. Co.*, 21 App. Div. 503, 506, 207 N.Y.S. 592, 594. Under almost any given state of facts, where to enforce a stipulation would be unjust or inequitable or permit the other party to gain an unconscionable advantage, courts will afford relief. *Donovan v. Twist*, 119 App. Div. 734, 104 N.Y.S. 1; *Humphries v. Shapiro*, 187 App. Div. 96, 175 N.Y.S. 426; *People ex rel. Tappin v. Cropsey*, 176 App. Div. 415, 162 N.Y.S. 927; *Matthiessen v. Orchidwood, Inc.*, 240 App. Div. 947, 267 N.Y.S. 1002; *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U.S. 403, 444, 22 S. Ct. 698, 46 N.Y.S. 968.



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In *Sperb v. Metropolitan El. Ry. Co.*, 57 Hun 588, 10 N.Y.S. 865, 866, affirmed 123 N.Y. 659, 26 N.E. 749, the rule is stated as follows: 'The right of the plaintiff to be relieved from this situation does not depend upon the strict rules of law; but, in view of the fact that the defendants have lost nothing by reason of the stipulation being given, the court could relieve the plaintiff from the stipulation even after it had been given by his own act, if it was given inadvisedly, and it would be inequitable to hold him to its terms.'" *Goldstein v. Goldsmith*, 243 App. Div. 268, 276 N.Y.S. 861, at 865, 866.

In *Chase Manhattan Bank v. Porter Flushing Realty Inc.*, *supra*, the court granted a motion to reform a stipulation entered into in a mortgage foreclosure action. The stipulation contained, in the words of the court, "conditions which were to become effective upon the then pending condemnation of the property. Since then, this condemnation has been indefinitely postponed . . .".

Defendant claimed that the court was without power to modify the stipulation. The court held to the contrary, stating the applicable doctrine as follows:

"This court's power to modify or even set aside a stipulation entered in pending litigation is clear. As stated in the *Goldstein* case, *supra*, at page 272 of 243 App. Div. at page 865 of 276 N.Y.S., 'Under almost any given state of facts, where to enforce a stipulation would be unjust or inequitable or permit the other party to gain an unconscionable advantage, courts will afford relief. (citing cases).' Similarly, in *Yonkers Fur Dressing Company v. Royal Insurance Company*, 247 N.Y. 435, 445, 160 N.E. 778, 781, the court stated that 'The Court unquestionably exercises a large control over all pro-

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ceedings in an action so long as the action is pending and the parties can be restored to their original position. (citing cases) In the exercise of its discretion it relieves litigants from stipulations signed by counsel *during the pendency of the case, on motion in the action*, when such stipulations were either unadvisedly or inadvertently signed, or when the circumstances reveal that the stipulation should not be held, in order to promote justice and prevent wrong.' (emphasis added) The cases cited by defendant are inapposite. In *Snead & Co. v. Brager Brothers*, 148 Misc. 603, 265 N.Y.S. 449, and *Greenwald v. Emex Royalty Company, Incorporated*, 173 Misc. 122, 17 N.Y.S.2d 333, the stipulations terminated the actions, and thus there was no action pending before the court when the motion to modify the stipulations was made. In fact in *Greenwald, supra*, the court specifically noted the point. *Kynin v. Grand Plaza Caterers*, 148 Misc. 156, 265 N.Y.S. 614, relied, solely, upon the *Snead* case, and to the extent it is inconsistent with the above quoted language from the *Yonkers Fur Dressing Company* case and with the *Goldstein* case is not controlling. See, also, *Colla-Negri v. Colla-Negri*, 8 Misc.2d 415, 165 N.Y.S. 2d 1019." *Chase Manhattan Bank v. Porter Flushing Realty Inc.*, 40 Misc. 2d 405, 243 N.Y.S. 2d 59, at 60, 61.

In *Huie v. Payuk, supra*, the Appellate Division, Third Department, applied the same doctrine in a condemnation proceeding. That case involved an appeal by the Board of Water Supply of the City of New York from an order of Special Term, Supreme Court, Sullivan County, denying an application to set aside a stipulation fixing the forum to determine title of the property, because the stipulation was based upon a good faith mistake of law,

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with respect to choice of forum. The Court emphasized that there had been no change in the parties' relative positions.

In the case at bar there has been no change in the parties' relative positions. The stipulation in question was predicated upon the fulfillment of certain specific understandings. It is clear from the notes taken by the Judge's secretary at the time the stipulation was entered into, that counsel for appellants was reserving his right to return to the Court and request relief from the literal terms of the stipulation if the conditions were not fulfilled. In fact, they were not fulfilled. As this Court stated in *Goldstein, supra*, the rule in such circumstances "is well understood". Where a party has entered into such a stipulation "there is, of course, power in the court to furnish relief . . . in furtherance of justice . . . where to enforce a stipulation would be unjust or inequitable or permit the other party to gain an unconscionable advantage courts will afford relief." As this Court pointed out in *Goldstein*, where the other party has lost nothing, the Court should relieve the disadvantaged party from the stipulation even though it was given by his own act, if it was given inadvisedly.

It is difficult to conceive of a clearer case for application of the *Goldstein* doctrine than the case at bar. The doctrine was applied in *Chase Manhattan Bank v. Porter Flushing Realty Inc., supra*, to less compelling facts than those involved in the case at bar. There, the stipulation contemplated condemnation of certain property. In this case, the stipulation contemplated the rendering of a bankable condemnation award as to the property of appellants located on the leased land. In the *Chase* case, the condemnation was indefinitely postponed, and the court modified the stipulation. In the case at bar the court not only failed to render a bankable award; it has failed



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to make a finding of amount as to any single item of property at all. Furthermore, the stipulation in the case at bar contemplated a determination of a bankable award as to the property of appellants located on the owned land, before possession of that land would be granted. In fact, the court below has not even commenced hearings as to the property on the owned land and yet the Order of possession encompasses the owned, as well as the leased, land.

It follows, *a fortiori*, from the decisions in the *Goldstein* and *Chase* cases and from the other authorities cited in those cases that the stipulation in the case at bar should have been set aside by the Court below.

## POINT II

THIS RESPONDENT SHOULD BE REQUIRED TO PROVE NEED FOR THE PREMISES; IN THE ABSENCE OF SUCH PROOF, NO ORDER OF POSSESSION CAN BE GRANTED PRIOR TO THE RENDERING OF A CONDEMNATION AWARD.

The general rule in condemnation proceedings is that possession will not be granted prior to payment of the condemnation award unless the need for possession is demonstrated. *City of Glen Cove v. Utilities and Industries Corporation*, 17 N.Y. 2d 205, 269 N.Y.S. 2d 704 (1966). This rule necessarily follows from the constitutional prohibition against the taking of private property for public use without just compensation. Even where there is no question regarding ability to pay the award plus interest, there must be a basis for the Court to exercise its discretion in favor of an earlier granting of possession.

In the *Glen Cove* case, *supra*, plaintiff moved under §24 of the New York State Condemnation Law that the court exercise its discretion to grant possession, upon a

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showing that the public interest would be prejudiced by further delay. Although the condemnation procedure set forth in the Administrative Code of the City of New York is specifically saved from repeal by §27 of the New York State Condemnation Law, the general rule set forth in §24 applies to New York City condemnation proceedings as well. See, decision of Justice Geller in the case of *In Re City of New York (New Municipal Building, etc.)* 161 N.Y.L.J. p. 2, col. 4F (February 10, 1969).

In the case at bar, respondent has never demonstrated that the public interest will be prejudiced by delaying the granting of possession until payment of a compensation award. On the contrary, the grounds advanced by respondent in motion papers and argument below, have been consistently challenged by appellants (R 37, 70-72, 89-91, 98-99, 119, 146).

Clearly, if the March 10 stipulation is set aside, the Orders of possession based on that stipulation must also be set aside; and the respondent must prove (in addition to its ability to pay) that it would seriously prejudice the public interest if possession of the property were not to be granted. *City of Glen Cove & New Municipal Building* cases, *supra*.

Respondent has taken the position that the March 10 stipulation has eliminated its obligation to demonstrate pressing need for the premises. In effect, respondent contends that appellants have waived their right to demand proof of adverse effect upon the public interest, resulting from delay in granting possession. This is simply another way of arguing that the stipulation should not be vacated or set aside. As we have demonstrated in Point I above, however, there is ample ground for setting aside the stipulation.

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But if respondent is considered to be correct in its contention that it no longer has the burden of proving need, the Orders of possession by the Court below should still be reversed. The stipulation should then be enforced in full, taking into account all of the understandings and conditions precedent that accompanied its execution. Since there has been no award whatsoever, let alone a bankable award, and since hearings with respect to the property located on the owned land have not yet commenced, the Court below should not have granted possession to respondent as of November 25, 1975, of all the premises. We respectfully submit that the order appealed from must, at the very least, be modified to provide for the granting of possession of each parcel only after the Court below has made findings as to value of the property located on such parcel and rendered a condemnation award with respect to such parcel.

POINT III

GIVEN THE CURRENT FINANCIAL CRISIS OF THE CITY OF NEW YORK, GRANTING POSSESSION OF THE PREMISES TO RESPONDENT WOULD BE VIOLATIVE OF BOTH THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF NEW YORK.

Both the United States Constitution and the Constitution of the State of New York provide that private property shall not be taken for public use without just compensation. U.S. Const., Amends. V, XIV; New York Const. Art I, §7 (1894).

On their face, the provisions would seem to require that payment for property condemned be made simultaneously with the taking of title. In the earliest days of



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eminent domain, that was, in fact, the requirement. *Kennedy v. Indianapolis*, 103 U.S. 599 (1880). However, that rule was modified to permit granting of possession prior to payment in the public interest—*provided* there is reasonable, certain and adequate provision to *secure* payment of the compensation to the private owner. 3 Nichols, *The Law of Eminent Domain*, §8711 et seq. (3 ed. 1975).

This doctrine has been applied both to Federal eminent domain takings, and to the States and their municipal subdivisions, *Sweet v. Rechel*, 159 U.S. 380 (1895); *Chicago B & Q R.R. Co. v. Chicago*, 166 US 226 (1897); *Foster v. Herley*, 330 F. 2d 87 (6 Cir. 1964). The doctrine has been unchallenged in this State since the 1882 Court of Appeals decision in *Sage v. City of Brooklyn*, 89 N.Y. 189.

Ordinarily, the municipality's power of taxation is considered adequate security and if the municipality can show pressing need, it can obtain possession of the land on the basis that payment of just compensation will be made in the ordinary course. However, there have been a number of instances in which the power of municipal taxation has not been considered adequate security. During the general economic depression of the 1930's a New Hampshire court held that the credit of a particular municipality was not sound enough to justify the usual presumption that its taxing and borrowing powers were sufficient to provide compensation for the land that it sued to take. *Goodrich Falls Electric Co. v. Howard*, 86 N.H. 152 (1934). A similar decision was reached in an early Pennsylvania case. *Keene v. Bristol*, 26 Pa. 46 (1856). The New Hampshire Court stated the issue in the following way:

"The duty to protect the owner calls for a rule in a public taking that payment must not be postponed beyond the taking unless the amount of pay-

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ment is then unascertained and unless there is reasonable certainty of prompt payment upon the ascertainment of its amount. The issue of equivalence of payment is in the first instance one of fact. But the finding of equivalence must be one of reasonable certainty, and the issue whether it may be thus found is here presented to be treated as one of law. Equivalence is not secured if certainty of it may not be a reasonable opinion and belief." *Goodrich Falls Electric Co. v. Howard*, 86 N.H. 152, 171 A. 761, at 767.

Nichols puts the rule similarly:

"The prevailing rule is that when the property is taken, unless compensation is paid in advance, the owner must have open to him a method of obtaining compensation *with reasonable legal certainty* and without unreasonable delay." Nichols, *The Law of Eminent Domain*, §209 (2 ed. 1917). (Emphasis Added)

In other words, the likelihood of payment cannot be "iffy"—it must be certain. If there is even a reasonable possibility of a municipality not being able to meet its obligations, certainty is lacking—and the equivalence that is substituted for simultaneous payment is no longer present.

Appellants requested the Court below and now respectfully request this Court, to take judicial notice of the financial problems being faced by the City of New York. The status of the City's finances as well as those of the State remain in a precarious position. Cases now on appeal from lower Courts challenge the constitutionality of moratorium laws recently passed in the Legislature, as those laws affect the rights of the City's bond and note holders. In one pending case, the Dormitory Authority of the State of New York has admitted its inability to secure a surety bond in affidavits submitted to the Appel-

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late Division, First Department on a motion to stay enforcement of a condemnation judgment in the amount of six million dollars.\*

As condemnees in possession, appellants are entitled to be paid by the City or given adequate assurance of payment before they are required to surrender or remove from their property. Appellants should not be relegated to the status of general creditors of the City, hoping against hope for payment, after they have been put out of business and out of possession.

This Court should not permit respondent to obtain possession of the premises upon the presumption that its taxing and borrowing powers are sufficient to provide the funds to meet payment of the compensation that will be awarded. That presumption can have no validity in the present factual situation. The taking of possession should be postponed until either compensation has been paid, or the City has been restored to such financial health that the validity of the presumption has been restored.

Justice Castaldi's decision of November 3 finding the amusement rides on the leased land to be non-compensable has compounded the problem (R 201 et seq.). Appellants believe that Justice Castaldi's finding of non-compensability is erroneous. As soon as a decree has been entered, appellants intend to appeal that finding. Not even a tentative decree has yet been entered, and we request this Court to take judicial notice that it is a policy of the Department of Relocation of the City of New York not to arrange for relocation or provide for the expenses of relocation, until a final decree has been entered. Thus, if possession is granted to respondent,

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\*See, *Dormitory Authority of the State of New York v. 59th St. & 10th Ave. Realty Corp. et al.*, Motion by Dormitory Authority of the State of New York for stay of enforcement. This matter is presently *sub judice* before the Appellate Division, First Department.



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appellants will be put to the enormous expense (estimated to be more than \$250,000) of moving and storing huge amusement rides and their appurtenant equipment and foundations, with doubtful likelihood of reimbursement. If appellants are then sustained upon appeal, they will have to account to respondent for the removed rides, because respondent will then own them and will be required to pay to appellants a condemnation award for them.

We respectfully submit that the granting of possession to respondent by the Court below was unconstitutional, unnecessary and impractical.

CONCLUSION

FOR THE FOREGOING REASONS, THE ORDERS APPEALED FROM SHOULD BE REVERSED. THE MARCH 10 STIPULATION SHOULD BE SET ASIDE, AND RESPONDENT SHOULD BE REQUIRED TO PROVE, AT AN EVIDENTIARY HEARING, NEED FOR POSSESSION OF THE PREMISES. POSSESSION SHOULD NOT BE GRANTED UNTIL APPELLANTS RECEIVE PAYMENT OR ARE ASSURED OF PAYMENT; AND, IN ANY EVENT, NOT BEFORE THE COURT BELOW HAS MADE A FINDING OF VALUE AS TO ALL THE PROPERTY AND RENDERED A FULL CONDEMNATION AWARD.

Respectfully submitted,

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*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

NEW YORK SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT.

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IN THE MATTER OF THE APPLICATION

*of*

THE CITY OF NEW YORK, relative to Writs of Assistants required for a project known as COLLEGE POINT INDUSTRIAL PARK URBAN RENEWAL PROJECT II within the area bounded generally by 15th Avenue, Whitestone Expressway, Flushing River, Flushing Bay, 28th Avenue, etc., in the Borough of Queens, City of New York, including title to street areas where the title in fee for street purposes has not been heretofore acquired by The City of New York.

MHG ENTERPRISES, INC., and other condemnees  
in possession,

*Appellants,*

—against—

THE CITY OF NEW YORK,

*Respondent.*

---

REPLY BRIEF FOR APPELLANTS

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## ARGUMENT

A. Respondent concedes that, pursuant to this Court's decision in *Goldstein v. Goldsmith*, 243 App. Div. 268, 276 N.Y.S. 861 (2d Dept. 1935), the courts have "inherent power to relieve a party from the effect of a consent judgment to avoid injustice". [Respondent's Brief ("Resp. Br."), page 10]. Respondent incorrectly characterizes the relief Appellants seek as "reformation" of the stipulation (Resp. Br. 2, 7, 10). In fact, Appellants' application to the Court below was to set aside the stipulation (R. 110, 139) under the *Goldstein v. Goldsmith* doctrine.

The *Goldstein* case and the other cases cited and analyzed in the principal brief of Appellants at pages 12 et seq. hold that the courts *should* set aside a stipulation to avoid injustice where the action continues to be pending and the parties can be restored to their original position. Respondent tries to avoid application of the *Goldstein* rule to the case at bar by misstating the facts. First, Respondent states that Appellants have no right to possession of the greater part of the land in any event because Appellants occupy that part of the land (the "leased land") either as squatters or as permit-holders (Resp. Br. 3). In fact, the leased land comprises less than one-third of all the land (R. 48, 61). Moreover, Justice Castaldi found directly to the contrary. Justice Castaldi held, as to the leased land:

"There is no doubt that as of the title vesting date, claimants were tenants in possession under a month-to-month written lease of March 29, 1971." (R. 205)

Next, Respondent states as "fact" that "it is exceedingly critical" that the City receive the property to complete land fill work (Resp. Br. 13); that the City has already expended over \$50,000,000 (Resp. Br. 13); and that funds



*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

are available to complete the project (Resp. Br. 14). Respondent further asserts that the contractor is ready to fill the land; that such filling is a necessary link in the chain of project continuity and if the work is not done promptly, the City will be required to replace the fill contract at higher prices (Resp. Br. 13). Not one of these statements is a statement of "fact"; all of them are contentions that have been made by Respondent, and disputed by Appellants.

Indeed, as early as August 4, 1975, Appellants' special condemnation counsel pointed out that:

"Now, the point of the matter is, they talk about this as the only area that they have to fill. But the point of the matter is, we did a survey again this morning before we came into Court of the areas open to be filled, including many people who were put out on the basis that it was needed to fill, and the land was not filled. There are hundreds and hundreds and hundreds and thousands of cubic yards of fill which they can put into these places before they even get here. On top of that, I understand there are even more areas coming into their possession starting on September 3rd, which will be available for fill at that time. This whole business of fill I really do not understand, and I would like to put them to their proof as to what the contract was, where the fill will go and how much fill is available to be put around, and all the rest."

"Now, there is more fill that can be put on the land which we had given up before. They filled some of it to perhaps to four feet, if I remember from their papers, others they filled to eight feet. There has not been any mud wave as they predicted. They said careful placement. The answer

*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

is there was no careful placement. The reason I know is that I have the contractor who filled some if it for Earthbank, because Earthbank did not do it. He went in there and told me the kind of careful placement of fill that went in there. They ran trucks, and they dumped it there, period, and that is all there was to it. He can fill the balance of what they have there without affecting this property and without there being earth moved or a mud wave, and he will testify to that as well. What I am saying is because they have set forth the reason they must have this land because of the financial damage it causes them, because of the fact that they must have it because this is the only place to fill, and that just is not so." (R. 89-91)

Respondent has never been required to prove need for the property and asserts on this appeal that the March 10 stipulation obviated the requirement for such proof (Resp. Br. 8). Thus, Respondent wants the best of both worlds—no requirement to prove need and yet acceptance of assertions that demonstrate need as "facts", although they have never been proved, and, indeed, are disputed. Appellants believe the stipulation should be set aside and Respondent should be put to its proof of these "facts".

Putting aside Respondent's assertions, the actual present situation is indisputably as follows: Respondent has been granted possession of the premises by the Court below without ever being required to prove need (R. 146). Appellants have been directed to give up the premises without ever having received an award (R. 146, 201, 213). The order of possession effectively puts Appellants out of business (R. 119, 120). Whatever payments may be due on their amusement rides and other equipment cannot be made (R. 119, 120). The proposed use of the premises is for an industrial park but there are almost

*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

no industrial park tenants (R. 119, 121-137); and the City's financial situation renders dubious the availability of funds to proceed with the project (R. 63-75m).

Respondent contends that in these circumstances the extensions of time granted by the lower Court constitute an adequate exercise of that Court's inherent equitable power to avoid injustice (Resp. Br. 10). Appellants dispute that contention. In fact, the injustice has not been remedied. Rather, Respondent has gained an unconscionable advantage over Appellants as the result of a stipulation entered into on the basis of expectations very different from what actually took place. The parties—or at the very least the Appellants—understood that possession would not be granted to either portion of the land before the rendering of a bankable award as to that portion. Respondent caricatures this position by stating that Appellants are demanding that possession be deferred until “exhaustion of the appellate process” (Resp. Br. 2, 9, 16). In fact, no such demand has been made by Appellants, but the misunderstanding on which the stipulation was based is illuminated by Respondent's argument. As Respondent notes at page 9 of its brief, special condemnation counsel to Appellants stated in the Court below that “we did not even contemplate an appellate process” at the time the stipulation was signed. At that time, the City had not challenged the compensability of the amusement rides. It was expected by special condemnation counsel to Appellants that, if the appraisals were promptly submitted by both parties, a compensation award in a mutually agreeable amount would be negotiated\* (R. 32, 57, 102). Thus, it was expected that there would be a “bankable award” preceding the order of possession.

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\*In fact, contrary to Respondent's assertion that it has fulfilled all the conditions of the stipulation (Resp. Br. 5), Respondent has not submitted any appraisal of the property on the owned land.



*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

Appellants are not demanding "exhaustion of the appellate process". They are asking only that the stipulation be set aside and Respondent be required to *prove* its need for possession of the premises. They make this request because the stipulation was entered into upon a misunderstanding of what would ensue. The result has been an unconscionable advantage to Respondent and injustice and inequity to Appellants. We respectfully submit that this Court's holding in *Goldstein v. Goldsmith*, *supra*, requires the setting aside of the stipulation in such circumstances.

B. Respondent asserts that Appellants have had sufficient time to relocate the portable amusement rides to other locations in order to continue operations (Resp. Br. 5). Respondent is well aware that appellant, MHG, has made heroic efforts to relocate the amusement park to other property within the City (including Ferry Point in the Bronx, the PDC Industrial Park Complex in Staten Island—where another operator received preference—and Spring Creek in Brooklyn), to no avail as of this date. Despite continuous assurances from City officials of their desire to retain this commercial enterprise in the City of New York, there has been no relocation.

C. Respondent makes reference to rent arrears owed by Appellants (Resp. Br. 20). The parties have made arrangements with regard to such arrears (R. 103) and the reference is totally irrelevant to this appeal.

D. The question of whether the amusement rides are compensable is not before this Court on this appeal. Nevertheless, Respondent quotes from Justice Castaldi's decision, finding the amusement rides on the leased land to be non-compensable, on the ground that MHG took a calculated risk and "gambled" (Resp. Br. 12); but goes

*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

on to assert that Appellants did not gamble at all, because they had several good seasons on the property after knowledge that it was going to be condemned (Resp. Br. 13, 14).

While Respondent's contentions as to Appellant's "gamble" are not relevant to this appeal, it is important to note that such contentions are not at all accurate. It is absolutely untrue that Appellants profited sufficiently by two seasons on the premises to pay off the costs of the amusement rides or to achieve substantial equity in them (R. 119, 120).

In fact, as it stands, Appellants are on the brink of financial collapse (R. 119, 120) and Appellants' financial crisis has been further intensified by their inability to relocate any of the amusement rides or to obtain assurance with respect to payment of relocation costs from the City's Department of Relocation.\*

Laying to one side Appellants' immediate financial problems, Appellants dispute Justice Castaldi's findings with respect to non-compensability of the rides, especially his conclusion that Appellants are not entitled to compensation for such items, because they "gambled".

Justice Castaldi apparently treated "intent of permanent annexation", one of the component elements in the definition of a compensable fixture, [*McRea v. Central National Bank of Troy*, 66 N.Y. 489 (1876)] as ascertainable from an isolated bit of testimony by Harold Glantz, Appellant MHG's president, excerpted out of context (R. 212).

Appellants here assert (and will urge on appeal from the lower court's decree) that such subjective analysis is

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\*Appellants are prepared to submit to this Court at the argument of this Appeal correspondence with the Department of Relocation, concerning this matter.

*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

contrary to the objective criteria set forth in decisions such as *Rose v. State of New York*, 24 N. Y. 2d 80, 298 N. Y. S. 2d 968 (1969), *In re Ruppert Brewery Urban Renewal Project, Borough of Manhattan, City of New York*, 67 Misc. 2d 863, 325 N. Y. S. 2d 438 (Sup. Ct., N. Y. Co. 1971) and *Application of the City of New York v. Atlantic Terminal Renewal—Stage 1*, 72 Misc. 2d 171, 338 N. Y. S. 2d 504 (Sup. Ct., Kings Co. 1972).

The text that should properly have been applied by Justice Castaldi is set forth in the *Rose* case:

"New York takes a broad view in evaluating what improvements are to be regarded as fixtures. Not only is machinery deemed a fixture 'where it is installed in such manner that its removal will result in material injury to it or the realty, or where the building in which it is placed was specially designed to house it, or where there is other evidence that its installation was of a permanent nature'. (*Matter of City of New York* [Whitlock Ave.], 278 N. Y. 276, 281-282, 16 N. E. 2d 281, 282; see, e. g., *Matter of City of New York* [Allen St.], 256 N. Y. 236, 176 N. E. 377, *supra*), but also those improvements which are used for business purposes and which would lose substantial value if removed (*City of Buffalo v. Michael*, 16 N. Y. 2d 88, 262 N. Y. S. 2d 441, 209 N. E. 2d 776; *Marraro v. State of New York*, 12 N. Y. 2d 285, 289, N. Y. S. 2d 105, 189 N. E. 2d 606; *Matter of City of New York* [339 Grand St. Corp.], A.D. 2d 498, 200 N.Y.S. 2d 802).

"This formation of the rules permits equitable treatment of the owner of fixtures. It signifies a recognition of the obvious realities confronting the business community. Modern business, in order to produce goods and services, invests heavily in



*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

cumbersome and complicated machinery which, because of the manner of its installation, can only be removed with difficulty." *Rose v. State of New York*, 24 N. Y. 2d at 86-87.

Furthermore, the "gamble" of conducting business—or even improving the business by addition of property—on condemned land is not a proper basis for treating such property as non-compensable. That kind of "gamble" is a proper use of private property. *Matter of City of New York and Briggs Avenue*, 118 App. Div. 224, 102 N.Y.S. 1102 (1st Dept. 1907).

On the basis of these authorities, Appellants believe that Justice Castaldi's decision that the amusement rides on the leased land are non-compensable should be reversed. In any event, that decision has only made the situation more inequitable and unjust to Appellants. Though Justice Castaldi stated that he was granting the Writ of Assistance "... with emphasis on the practicalities," [R. 201] the result is impractical, as well as unjust. If Appellants remove the rides from both portions of the land, as Justice Castaldi has directed, they cannot be sure of receiving reimbursement of relocation costs. If they prevail upon appeal on the issue of compensability of the rides, Respondent will own the rides and Appellants will have to account to Respondent for them. Respondent, on its part, will have to account to Appellants for on site value of the rides, removal and storage costs. The result will be an initial cost to Appellants that may drive them to financial collapse, and eventual cost to Respondent higher than need be.

E. Both the Federal and State Constitutions provide that there shall be no taking of private property for public use without just compensation (5th and 14th Amendments to the United States Constitution; New York State Constitution Article 1, Section 7). These constitutional

*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

provisions *limit* the sovereign right to take property for public use and therefore necessarily affect every condemnation proceeding.

Respondent, in effect, takes the position in the case at bar that the constitutional provisions should be disregarded. At page 7 of its brief, Respondent asserts the right to take immediate possession of the premises without regard to just compensation. According to Respondent, "When the city is ready to implement the improvement, it may immediately take possession and the possessor, under the code, must comply. If it does not, as here, then the city can physically seize possession...". The "code" referred to by Respondent is the New York City Administrative Code and particularly Section B15-36.0. It is respectfully submitted that the Administrative Code cannot be interpreted to confer such absolute power; or the code would be unconstitutional.

Actually, Respondent has prudently proceeded by Writ of Assistance—the proper, if not exclusive, remedy by which a condemnor may seek physical possession of condemned premises *Matter of New York Central and Hudson River Railroad Co.*, 60 N.Y. 116 (1875). We respectfully submit that Respondent is not only not entitled to "physically seize possession", it is also not entitled to a Writ of Assistance, without a positive showing both that just compensation will be paid and that the property is immediately *needed*. Until such time, Appellants have the right to make continued business use of the premises. Respondent relies heavily on the argument that a grant or denial of a Writ of Assistance may be reversed only for abuse of judicial discretion (Resp. Br. 8, Point 2). Respondent cites Real Property Actions and Proceedings, Section 221, which provides that the court "in its discretion" may direct the sheriff to put into possession of property a party who has received a judgment decree for

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title (Resp. Br. 8, 11). Also Respondent cites the *Long Island City Savings and Kilpatrick* cases (Resp. Br. 11).

Both cases cited by Respondent deal with mortgage foreclosure situations and to the extent that Section 221 has application to mortgage foreclosures, Respondent's argument is sound. But the argument is completely without merit with respect to a condemnation proceeding. In such a proceeding, the standard for determining abuse of discretion must include reference to the constitutional limitation. The judgment decree of title, in such a proceeding, is not a judgment of rightful ownership due to mortgage default—but rather a judgment of eminent domain taking. Where, in a mortgage foreclosure action, it may be an abuse of discretion not to direct the sheriff to put the mortgagee in possession upon a mere showing of a judgment decree of title, such a direction in a condemnation proceeding would be an abuse of discretion—unless there was also assurance of just compensation and a showing of need. *Garrison v. City of New York*, 88 U.S. 196 (1874); *Sweet v. Rechel*, 159 U.S. 380 (1895); *Sage v. City of Brooklyn*, 89 N.Y. 189 (1882); *City of Glen Cove v. Utilities and Industries Corporation*, 17 N.Y. 2d 305, 269 N.Y.S. 2d 704 (1966).

As to the showing of need, Respondent argues that the March 10th stipulation has obviated that requirement (Resp. Br. 8). We have demonstrated above that the stipulation should be set aside in the interests of justice; and that Respondent should be put to its proof with respect to its assertions of need for the premises.

As to just compensation, Respondent argues that Appellants are not entitled to any assurance of payment, beyond the assurance provided by the usual presumption that a municipality is solvent. Indeed, Respondent contends that the "basic proposition" is "that the condemnor is entitled to possession without requirement of



*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

simultaneous payment, unless qualified by State constitution or statute" (Resp. Br. 16). Respondent is in error. The "basic proposition"—i.e., the Constitutional proposition—is that the condemnee is entitled to receive just compensation at the time of the taking (Appellants' Principal Brief, Point III, 19-23). That basic proposition has been modified to permit the condemning authority to receive earlier possession upon a showing of pressing need, provided that just compensation is secure and assured—i.e., there is an "equivalency" to simultaneous payment.

Although municipalities have been granted the benefit of a presumption with respect to ability to pay, through exercise of the taxing power, the "basic proposition" remains unchanged—no person's private property may be taken for public use without assurance of just compensation; and no possession prior to payment may be granted, even when just compensation is assured, except upon a showing of pressing need.

The cases cited by Respondent do not support any different proposition. In *City of Marshall v. Allen*, 115 S.W. 849 (Ct. of Civ. App., Texas 1909), condemnor had to make simultaneous payment or furnish an adequate bond to cover possible damage. The Court dealt at length with the condemnor's responsibility for damage; and the extensive quotation from the *Marshall* case at pages 18 and 19 of Respondent's brief, explaining the difference between municipalities and private corporations with respect to the presumption of solvency, is irrelevant to that decision and adds nothing to the case at bar. *Sheffield v. Town of Duncanville*, 236 S.W. 2d 851 (Ct. of Civ. App., Texas 1951) was another case dealing with a bond to cover possible damages; there had been a showing by evidence in the lower Court that the municipality was actually solvent. *Wallace v. Newcastle Northern Ry. Co.*, 22 Atl. 95 (Pa. 1890) merely held that the future solvency of a surety company was not in issue. None

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of these cases suggests that the ability of a municipality to pay may not be questioned; and none of them suggests that possession may be granted in the absence of adequate security for payment.

The final, fallback position of Respondent is that Appellants are engaging in "speculation" (Resp. Br. 17) and "conjecture" (Resp. Br. 19) as to the ability of the City of New York to pay. Respondent argues that it is the burden of Appellants to make "a clear showing of insolvency" (Resp. Br. 17) and to prove that the City "is insolvent and cannot pay an award". (Resp. Br. 19). It is respectfully submitted that Respondent has misplaced the burden of proof. Respondent is the party requesting immediate possession of the premises prior to payment of any award. Respondent has the burden of demonstrating that just compensation will be paid. Certainly, Respondent may invoke the presumption that a municipality is able to pay such an award by exercise of its taxing power—but that presumption is not conclusive.

The obligations of New York City to bondholders have been deferred by statutory declaration of a moratorium (Ch. 874, Laws of 1975). It is appropriate to take judicial notice of New York City's financial condition and of the fact that City officials gave condemnation awards a law priority for payment (R 75-75m). The City's finances are now controlled by the Emergency Financial Control Board (Ch. 868, Laws of 1975). That Board has not indicated its position with respect to the payment of condemnation awards.

In the circumstances, the presumption of ability to pay is not adequate security. Respondent should have been required by the lower Court to demonstrate affirmatively that the City would pay any condemnation award within

*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

a reasonable time. The failure of the lower Court to require such a demonstration was an abuse of discretion; and the order of possession, without such a demonstration, violated the constitutional limitation.

CONCLUSION

THE ORDER OF THE COURT BELOW SHOULD BE REVERSED,  
AND RESPONDENT SHOULD BE REQUIRED TO PROVE NEED FOR  
THE PREMISES AND THAT JUST COMPENSATION WILL BE PAID.

Respectfully submitted,

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*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

MEMORANDUM OF LAW

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

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IN THE MATTER OF THE APPLICATION

of

THE CITY OF NEW YORK, relative to Writs of Assistance required for a project known as COLLEGE POINT INDUSTRIAL PARK URBAN RENEWAL PROJECT II within the area bounded generally by 15th Avenue, Whitestone Expressway, Flushing River, Flushing Bay, 28th Avenue, etc., in the Borough of Queens, City of New York, including title to street areas where the title in fee for street purposes has not been heretofore acquired by The City of New York.

MHG ENTERPRISES, Inc., and other condemnees in possession,

*Appellants,*

*against*

THE CITY OF NEW YORK,

*Respondent.*

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted on behalf of appellants in support of motion for stay of enforcement, pending appeal, of an Order of the Honorable Michael A. Castaldi dated October 7, 1975, which directs appellants to give over possession of certain premises on November 1, 1975.

*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

This memorandum will deal only with the constitutional issues raised by granting possession of property for which payment has not yet been made, in the current financial condition of the City.

## ARGUMENT

The Law of Eminent Domain has developed in a separate and special way because of constitutional provisions governing the taking of private property for public use. Both the United States Constitution and the Constitution of New York State provide that private property shall not be taken for public use without just compensation. U. S. Constitution amends. V, XIV; N. Y. Constitution Art. I §7 (1894).

On their face, these provisions would seem to require that payment be made simultaneously with the taking of the property and, in the earliest days of eminent domain, that was, in fact, the requirement. *Kennedy v. Indianapolis*, 103 U. S. 500. But the rule was modified, and the current prevailing doctrine is that compensation need not be paid or even determined, before the property is taken from the private owner for public use—*provided* reasonable, *certain* and adequate provision is made to *secure* payment of the compensation to the private owner. 3 Nichols, *The Law of Eminent Domain*, §8.711 (3ed. 1975). That doctrine has been unchallenged in this State since the Court of Appeals decision in *Sage v. City of Brooklyn* in 1882, 89 N. Y. 189.

Ordinarily, the power of taxation given to a municipality is considered adequate security and the public authority can demand possession of the land on the basis that payment of just compensation will be made in the ordinary course. However, there have been a number of instances in which the power of municipal taxation has not been considered adequate security.

*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

During the general economic depression of the 1930's a New Hampshire court held that the credit of a particular municipality was not sound enough to justify the usual presumption that its taxing and borrowing powers were sufficient to provide compensation for the land that it sued to take. *Goodrich Falls Electric Co. v. Howard*, 86 N. H. 152 (1934). A similar decision was reached in a Pennsylvania case. *Keene v. Bristol*, 26 Pa. 46. The New Hampshire Court stated the issue in the following way:

"The duty to protect the owner calls for a rule in a public taking that payment must not be postponed beyond the taking unless the amount of payment is then unascertained and unless there is reasonable certainty of prompt payment upon the ascertainment of its amount. The issue of equivalence of payment is in the first instance one of fact. But the finding of equivalence must be one of reasonable certainty, and the issue whether it may be thus found is here presented to be treated as one of law. Equivalence is not secured if certainty of it may not be a reasonable opinion and belief." *Goodrich Falls Electric Co. v. Howard*, *supra*, at 767.

*Nichols* puts the rule similarly:

"The prevailing rule is that when the property is taken, unless compensation is paid in advance, the owner must have open to him a method of obtaining compensation *with reasonable legal certainty* and without unreasonable delay." 1 *Nichols, The Law of Eminent Domain*, §209 (2ed. 1917). (Emphasis Added)

In other words, the future payment must be certain. If there is doubt whether a municipality may be able to meet its obligations, certainty is lacking—and the equivalence that is substituted for simultaneous payment is no longer present.



*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

On October 17, 1975, a default was averted at the eleventh hour. At that time, consideration was given by public officials to the problems of priority for payment of various City obligations in the event cash was not available to pay all obligations. A disagreement, which was widely reported upon in the press, developed between the Comptroller of the City of New York and other members of the Board of Estimate. The Corporation Counsel of the City of New York prepared a petition to the Supreme Court to direct the Comptroller to meet payments of obligation on a specific priority basis.

Neither the Comptroller nor those disagreeing with him place a high priority on eminent domain payments. On the contrary, the Comptroller's position was that first money must be appropriated, by law, to the payment of the claims of bondholders and note holders as they mature; and that after such payments, as any money was available, it would be used to pay the salaries of municipal employees. The Comptroller's priority list left eminent domain creditors and general creditors in the same position, at the end of the line.

The other members of the Board of Estimate and the Mayor's Contingency Committee took the position that life-saving services must be maintained; and that priority for payment, therefore, must be given to police, fire, sanitation, corrections, health and hospital employees. Their list continues with education, higher education, and law enforcement activities, such as those of the District Attorney. On this list as well, the eminent domain creditors and the general creditors were last in line, after payment to vital employees and to bond holders and note holders. (See Squadron Affidavit.)

It is common knowledge that, in the absence of federal intervention, the City will default in payment of its obli-

*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

gations during the first week in December. The taking of appellants' property is scheduled for November 1. It is obvious that compensation will not be paid prior to the first week in December. Therefore, there is the real possibility of the result forbidden both by the Federal and State Constitutions—i. e. the taking of private property for public use without just compensation.

Since the City has never been put to its proof of actual need for the premises, in the expectation that the awards of this Court would be bankable (because the credit of the City was deemed to be impeccable), such a result would be ironic as well as unjust

## CONCLUSION

This Court should stay the Order of October 7, 1975, pending determination of the appeal.

Respectfully submitted,

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*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

APPELLANTS BRIEF IN SUPPORT OF MOTION  
FOR STAY.

COURT OF APPEALS,

OF THE

STATE OF NEW YORK.

---

IN THE MATTER

of

The Application of THE CITY OF NEW YORK, relative to Writs of Assistance required for a project known as COLLEGE POINT INDUSTRIAL PARK URBAN RENEWAL PROJECT II within the area bounded generally by 15th Avenue, Whitestone Expressway, Flushing River, Flushing Bay, 28th Avenue, etc., in the Borough of Queens, City of New York, including title to street areas where the title in fee for street purposes has not been heretofore acquired by The City of New York.

MHG ENTERPRISES, Inc. and other condemnees in  
possession,

*Appellants,*

*against*

THE CITY OF NEW YORK,

*Respondent.*

---



*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

## PRELIMINARY STATEMENT

This brief is submitted on behalf of MHG Enterprises, Inc. ("MHG") and others (collectively referred to as "the Appellants")\* in possession of property located in Flushing, Queens, condemned by Respondent City of New York (hereinafter referred to as "the Respondent" or "the City"). The brief is submitted in support of Appellants' motion for a determination that the stay granted by the Appellate Division, Second Department, on November 21, 1975 continues, pursuant to §5519(e) of the Civil Practice Law and Rules, pending determination of the appeal to this Court from the order of such Court dated February 23, 1976 ("the order on appeal") or, alternatively, for a stay of execution, pending determination of this appeal, of orders entered upon direction of the Appellate Division requiring Appellants to vacate the condemned premises.

This Court's jurisdiction to hear this appeal rests on the provisions of C.P.L.R. §5601(b) (1) in that the Order on appeal finally determines the action and that the determination of the Appellate Division directly involved a substantial question as to the construction of Article I, §7 of the New York State Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

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\*The various condemnees are listed on Schedule A annexed to the Order to Show Cause.

*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

## FACTS

The Record on Appeal to the Appellate Division (hereinafter "R") and the motion papers herein establish the following facts.

Appellant MHG conducts an amusement park operation on premises located in Flushing, New York. The other Appellants are licensees and tenants of MHG. The premises are part of a larger tract of land designated by the City for the College Point Industrial Park Urban Renewal Project II (the "Project"). The Project is being developed for the City by the New York City Public Development Corporation ("PDC"), a quasi public corporation.

A portion of the premises (the "owned land") was owned prior to condemnation by a partnership affiliated with MHG. The balance of the premises (the "leased land") was leased by MHG from the City. Urban renewal condemnation orders vested title in the City as to the leased land on December 1, 1972; and as to the owned land on April 3, 1974. (R. 191)

On September 18, 1974, although there had been no hearings as to the amount of the condemnation award, the City commenced Writ of Assistance proceedings for possession of the premises. Numerous affidavits and exhibits were submitted both by Appellants and Respondent on the question of the City's immediate need for the property.

On March 10, 1975, the parties entered into a stipulation of consent to an order, apparently granting Respondent possession of the leased land as of May 5; and the owned land as of November 1st. Appellants' consent to the Stipulation rested upon an understanding between the parties that Appellants would receive a "bankable"

*Exhibit D, Annexed to Affidavit of Leonard Olarsch*

award as to each portion of the premises, before there would be any direction to the Sheriff to take possession of that portion. That understanding was noted by Mr. Wimpfheimer, Justice Castaldi's law secretary at the time. (R. 164-166.)

As to the owned land, the stipulation provides in paragraph 7 that in consideration of the November 1, 1975 date being agreed to by Appellants, the Respondent "agrees to expedite and accelerate the completion of all appraisal work in respect of fixtures and equipment (on the owned land) and to submit same for the Court's consideration as speedily as possible". (R. 198)

To this date, there has not been any determination—let alone a "bankable" one—on the amount of any condemnation award for any fixtures—whether located on the leased land or the owned land. There have been no hearings whatsoever with respect to the fixtures on the owned land, or as to the owned land itself, and the parties have been notified by the Court below that such hearings will not commence before mid-year. Moreover, Respondent has not submitted any appraisals with respect to the fixtures and equipment on the owned land.

With respect to the property on the leased land, hearings did commence on May 5, 1975 and continued through the Summer. In those hearings, the City, for the first time, questioned the compensability of the amusement rides, the bulk of the property on the leased land. On July 16, 1975, while the case was pending and Justice Castaldi was on vacation, PDC instructed the Sheriff of the City of New York to execute against the leased land. Justice Castaldi, at his vacation home, signed an order to show cause why such execution should not be stayed; and after argument, Justice Castaldi stayed enforcement of the order of possession with respect to the leased land until October 1, 1975, upon the express ground that,



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"there were subsequent problems insofar as \* \* \* a determination of the condemnation claims by the Court" (R. 106) Justice Castaldi stated: "\* \* \* hopefully the Court will render his decision in the condemnation claims by October 1, 1975." (R. 107)

By September 20, Justice Castaldi had indicated informally that it was unlikely that the October 1st date would be met. Accordingly, on September 22, 1975 Appellants moved to vacate all prior orders of possession and to set down the entire question of possession of both the leased and owned land, for an evidentiary hearing. At the argument, Justice Castaldi confirmed the understanding of Appellants that a condemnation award was to precede possession with respect to both portions of the premises. (R. 144-145) Nevertheless, he refused to vacate and set aside the prior orders of possession, but merely modified them by extending the October 1 date with respect to possession of the leased land to November 1. Accordingly, Justice Castaldi's order dated October 7, directed Appellants to vacate the entire premises on November 1, 1975, although no hearing with respect to the owned land or the fixtures on the owned land had been commenced. On the contrary, that hearing had been adjourned *sine die*; and no date for its commencement has yet been scheduled.

At the time of the March 10, 1975 stipulation, the City's financial crisis was still a speck on the horizon. By early Autumn, however, that crisis was full blown. During the last weeks of October, 1975 two of the highest officials of the City, the Comptroller and the President of the City Council were in public disagreement over the priority of payment to be ascribed between municipal life saving services and the City's bond and noteholders. However, they agreed that creditors of the City—including condemnation creditors—could only be paid from

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what might be left over. (Affidavit of Howard M. Squadron, November 4, 1975, annexed to Appellate Division Order to Show Cause dated November 6, 1975.) It was apparent to all that the City was, in fact, insolvent. Accordingly, Appellants moved to renew their motion to vacate and set aside the orders of possession on the ground that it would be unconstitutional to take their property without more certain assurance than the City was able to give that just compensation would be paid. On November 3, Justice Castaldi denied the motion to renew and directed Appellants to vacate the entire premises on November 25, 1975.

Appellants appealed from Special Term's order of possession and obtained a stay pending appeal from the Appellate Division. On February 23, 1976, the Appellate Division unanimously affirmed the orders on appeal and remanded proceedings to Special Term for the sole purpose of fixing a new date by which Appellants were to vacate their premises. Special Term rendered a "memorandum determination" directing that Appellants vacate their premises by March 15, 1976.

Appellants then moved for a hearing on the question of fixing a "practicable" new date. The motion was denied on March 12 and Appellants have now been directed to remove from the premises by March 22, 1976.

Respondent has moved in the Appellate Division to vacate the stay granted by the Appellate Division pending the decision of that Court. The purpose of such motion is to defeat Appellants' claims that such stay continues pursuant to CPLR §5519(e), pending determination of this appeal. Appellants have opposed such motion on the ground that only this Court has jurisdiction to grant such relief. Appellants also moved for reargument or, alternatively, resettlement of the order on appeal. As of this writing, these motions remain *sub judice*.

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On March 15, 1976, Appellants sought temporary relief from Judge Fuchsberg pending determination of this motion. In light of the understanding reached between counsel for the parties—that the Respondent would not act to compel Appellants to vacate the premises until the determination of the motion—Judge Fuchsberg did not include a temporary stay in the order to show cause bringing on this motion. Thus, there is no stay (other than pursuant to §5519[e]) currently in effect.

POINT I

THE ORDER ON APPEAL FINALLY DETERMINES THE ACTION

The order on appeal finally determines Appellants' right to continued possession of their property. It is well settled that an order directing an immediate transfer of possession of real property is one which causes irreparable injury and thus is considered final—without reference to the possibility of subsequent restitution. *Cohen and Karger, Powers of the New York Court of Appeals*, §17 (2d ed., 1952) at 73 n. 99, 74.

The finality of such an order is not affected by a remand for proceedings consistent with the decision where there remains only the ministerial task of fixing a date for transfer of possession. *Ibid.*, §11, at 47 n. 42, 48. Special Term has fixed the date *sua sponte* without notice to any party and has subsequently refused a hearing. Thus, the "remand" has not mitigated the finality of the determination in any respect.

Similarly, the pendency of Appellants' motions to re-argue and resettle do not disturb the finality of the order on appeal. Such motions do not themselves result in appealable orders, *Ibid.*, §147 at 585, and do not extend the



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time in which to appeal or seek leave to appeal. *Ibid.*, §104 at 436. Hence, such motions have no substantive effect on the jurisdiction of this Court.

POINT II

THE ORDER ON APPEAL DIRECTLY INVOLVED THE CONSTRUCTION OF ARTICLE 1 §7 OF THE NEW YORK STATE CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

A cursory review of the opinion of the Appellate Division leading to the order on appeal demonstrates beyond question that construction of both State and Federal Constitutional guarantees was directly involved.

Appellants relied on three points in their argument to the Appellate Division: that the stipulation for possession should be vacated; that the City should be obliged to show actual need for possession; and that granting possession prior to payment in the current financial crisis of the City of New York violated their constitutional right to just compensation.

The Appellate Division, had it decided for Appellants, could have predicated such decision on any of Appellants' claims. *Cohen & Karger, op. cit.* §57 at 260. But, in affirming Special Term, the Appellate Division necessarily reached and determined adversely to Appellants all three claims.

Messrs. Cohen and Karger have written of the jurisdictional requirement of direct involvement of a constitutional question:

Where the determination of the Appellate Division necessarily rests on a decision of both the constitutional and the non-constitutional questions, the con-

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stitutional question is directly involved though there be no statement of the grounds of decision. *Ibid.* at 258.

In this case, there is a clear "statement of the grounds of decision". Indeed, the Appellate Division did not even deem the first two claims worthy of extended comment. Instead, that Court's opinion describes Appellants' position as follows:

Primarily they [Appellants] argue that the City's fiscal condition is such that they are being deprived of their property in violation of the constitutional mandate.

Then, the Court determined the constitutional question, albeit incorrectly, as follows:

Although we recognize the City's fiscal problems, there has been no showing that it is unable or unwilling to fulfill its legal commitment to properly compensate Appellants for the property condemned:

This determination was an avoidance of the question before the Court—i. e. whether appellants were entitled to an opportunity to make such a showing at an evidentiary hearing. In any event, it is clear that the decision necessarily and directly involved construction of constitutional provisions.

## POINT III

## THE CONSTITUTIONAL ISSUE PRESENTED IS SUBSTANTIAL

The constitutional question which is central to this appeal is whether the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, §7 of the Constitution of the State of New York prohibit the

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condemning authority from taking possession of property prior to payment where the ability of such authority to pay compensation is in serious doubt.

On this motion it is not necessary to decide the merits of this constitutional issue. Rather it need be determined only whether the issue raised is substantial, i. e. debatable, and not utterly lacking in merit. *Cohen & Karger, op cit.*, §55 at 253. See also, 7 Weinstein-Korn-Miller, *New York Civil Practice* ¶5601.08.

The issue presented by this appeal satisfies, we submit, even the most restrictive definition of substantiality. The issue has never been the subject of decision by this or any other court in New York State, except in this matter. It requires decision at this time, in some case, because of the continuing grave financial condition of New York City. The precedents are scarce. Only two Appellate courts in the United States have ever faced the question directly, and both decisions were favorable to Appellants. *Goodrich Falls Electric Co. v. Howard*, 86 N.H. 152 (1934); *Keene v. Bristol*, 26 Pa. 46 (1856).

The basic constitutional proposition—set forth in Article V of the Bill of Rights (and made applicable to State action by the Fourteenth Amendment) and in Article 1, §7 of the New York State Constitution—is that no person's private property may be taken for public use without just compensation. On its face, this proposition would seem to require the payment for property condemned be made simultaneously with the taking of title. In the earliest days of eminent domain, that was, in fact, the requirement. *Kennedy v. Indianapolis*, 103 U. S. 599 (1880). However, that rule was modified in the public interest to permit granting of possession prior to payment *provided* there is reasonable, certain and adequate provision to secure payment of the compensation to the private owner. 3 Nichols *The Law of Eminent Domain*, §8.711 *et seq.* (3d. ed. 1975).



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This doctrine has been applied both to Federal eminent domain takings, and to the States and their municipal subdivisions, *Sweet v. Rechel*, 159 U. S. 380 (1895); *Chicago B & Q R.R. Co. v. Chicago*, 166 U. S. 226 (1897); *Foster v. Herley*, 330 F. 2d 87 (6 Cir. 1964).

In this State, as elsewhere, it is now the rule that compensation for property condemned by the State need not be paid or even ascertained prior to the actual taking if provision for compensation has been made, *but only* if such provision is "without hazard or doubt". *Chapman v. Gates*, 54 N. Y. 132, 145 (Comm. of App. 1873); citing *Rogers v. Bradshaw*, 20 Johns, 735 (1823) and *Bloodgood v. Mohawk & Hudson R. Co.*, 18 Wend. 9 (1837). In *Chapman*, the Commission (later the Court) of Appeals emphasized repeatedly the validity of only those laws providing that "the fund from which compensation is secured is a public one, and *certain* . . ." *Chapman v. Gates, supra*, at 145 (emphasis added) and "the security provided for an *early* as well as *certain* payment of compensation . . ." *ibid.*, at 146 (emphasis in original). The Commission quoted *People v. Hayden*, 6 Hill 859 to the effect that "'at least *certain* and ample provision must be first made by law (except in cases of public emergency), so that the owner can *coerce payment* through the judicial tribunals or otherwise *without any unreasonable or unnecessary delay*; otherwise the law making the appropriation is no better than blank paper;'" (emphasis in original).

This insistence on certainty of payment led the *Chapman* court and its successors to reject the sufficiency of payment under special assessments. See, e. g. *Sage v. City of Brooklyn*, 89 N. Y. 196 (1882). Cf. *Matter of Church*, 92 N. Y. 1, 6 (1883); *Matter of United States*, 96 N. Y. 227 (1884).

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The courts have been satisfied in the past that payment was a reasonable certainty if the full faith and credit of a public entity, based on its taxing power, backed the obligation. *Sage v. City of Brooklyn, supra*. The courts assumed that the public well would not run dry. As Professor Nichols wrote prior to 1917:

"While it is obvious that when compensation is not paid in advance of the taking, there can be no absolute certainty that the owner will get his money at all, for even the government might be overthrown in the interval, or become insolvent, or repudiate its obligations, the possibility of such happening is so remote as to be of no practical importance, . . .". I Nichols, *The Law of Eminent Domain* §209 at 632.

Yet he recognized that there were circumstances where such a possibility became less "remote":

"On the other hand, if his buildings are destroyed and his land dug up by a railroad on the verge of bankruptcy, or by a municipality already unable to pay its debts, unless he receives the compensation guaranteed him by the constitution in advance, he is likely to lose it altogether." *Ibid.* at 633.

Such circumstances came to pass during the depression. At that time, the New Hampshire Supreme Court deemed it a constitutional obligation to require a financial unsound municipality to pay compensation prior to taking possession of condemned property. In *Goodrich Falls Electric Co. v. Howard*, 86 N. H. 512, 171 Atl. 761 (1934), that court reviewed a challenge to a statute permitting entry prior to payment on the ground that future payment of just compensation was not secured. The court stated the law of New Hampshire, in exactly the terms of the New York cases, as that

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... while payment need not always be made when the property condemned is taken, yet when it is deferred, there must be an equivalent of payment in the form of security or obligation which in reasonable certainty will produce payment with due promptness. If eventual payment is in any fair way uncertain, the right to it is not the equivalent of present payment. Briefly, the payment must be insured." 171 Atl. at 766.

*Goodrich* held directly that payment is not insured unless municipal credit is reasonably certain, not merely probable. Reasonable certainty requires more than a balance of probability; it requires conclusive evidence that payment will be made. *Ibid.* at 767.

This requirement applies to municipalities and operates to permit deferred payment only by those municipalities whose credit is without doubt. The *Goodrich* court concluded that the "circumstances of security are to be examined in each case in order to determine if they afford the protection he is entitled to." 171 Atl. at 768.

Despite public knowledge of the City's financial condition and uncontroverted evidence of the low priority of this kind of creditor's claim, the courts below improperly refused to examine into the City's ability to pay. Rather, they relied on the "presumption" that a state or the political subdivision of a state, always pays its debts. Moreover, they treated what is at best, a rebuttable presumption of fact, as an irrebuttable presumption of law, thus vitiating the constitutional mandate. Yet, as *Goodrich* notes, the creation of such an irrebuttable presumption is clearly unconstitutional. There is no authority for the proposition that a municipality, merely by reason of its public nature, is legally entitled to a "presumption of credit". 171 Atl. at 770.



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The mere existence of the full faith and credit of a political subdivision was deemed by the court in 1882 (*Sage v. City of Brooklyn*) to be sufficient security for payment of condemnation awards. Today, such full faith and credit is not the only relevant fact.

The *de facto* default in payment of New York City obligations resulting from the moratorium legislation (Ch. 874, Laws of 1975), the virtual cessation of the City's capital construction program, and the fact that credit markets are closed to the City, are also relevant, significant facts. Should this Court rule in favor of Appellant in the now pending *Flushing National Bank* case, thus voiding the moratorium legislation, it is a near certainty that the City will be compelled to seek relief in the federal bankruptcy court. And the use of the bankruptcy laws is being urged by responsible community leaders, in any event. (See, Samuels, H. *The Uses of Default—The Inevitable is now Desirable*, *New York Magazine* (New York), March 15, 1976 at 42.) There is certainly basis to question "early . . . and certain payment" of a condemnation award.

Neither law nor reason obliges owners of condemned property to extend credit to the City involuntarily, when no one will extend such credit voluntarily. Such an involuntary extension of credit when ultimate payment is doubtful, is the very essence of an unconstitutional taking.

Appellants recognize the serious consequences of their position with respect to the City's powers to acquire property. Appellants submit that the constitutional requirement must be met, nonetheless. The conclusion reached in *Goodrich* has been called "manifestly in accord with the purpose of the requirement of just compensation" 43 Yale L. J. 1329, 1332 (1934). Whether or not this Court agrees on the merits with the *Goodrich* decision, and whether or not it agrees that the *Goodrich* decision is applicable to

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this case, it is clear that a substantial constitutional issue is involved. Accordingly, Appellants respectfully submit that this appeal lies as of right.

POINT IV

THE STAY GRANTED BY THE APPELLATE DIVISION CONTINUES IN EFFECT PURSUANT TO CPLR §5519(e)

On November 21, 1975, the Appellate Division granted a stay to Appellants pending determination of the appeal to that Court. That appeal was determined on February 23, 1976. Thereafter, on March 3, 1976, Appellants served and filed a Notice of Appeal to this Court from the determination of the Appellate Division. Appellants respectfully submit that in such circumstances, CPLR §5519(e) extends the stay granted by the Appellate Division pending the determination of the appeal to this Court.

CPLR §5519(e) provides for the continuation of a stay granted under one of the earlier provisions of §5519 until the final determination of an appeal from the order of the court that has granted the stay. Since the Appellate Division stay in this case is covered by the provisions of §5519(e), continuation of the stay in this case would appear to be *pro forma*.

However, Appellants recognize that there is a paucity of authority in interpreting §5519(e); and it is possible to limit that section to non-discretionary stays granted under subparagraphs of §5519 [other than §5519(e)].

Appellants submit that the more reasonable interpretation is that §5519(e) applies to all stays covered by the other subparagraphs of §5519. In the Judicial Conference report on CPLR §5519(e) appearing in the 1975

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volume of McKinney's Session Laws of New York at page 1510, the commentary emphasizes the applicability to "any stay" of all other provisions of §5519(e). Consistency would require the same interpretation of that portion of §5519(e) which extends a stay granted by a lower court.

Such an interpretation was adopted in the one case where §5519(e) was interpreted. In *Ferguson v. The City of New York*, 67 Misc. 2d 812, 324 N. Y. S. 2d 894 (Sup. Ct., Orange Co., 1971), modified 39 App. Div. 2d 569, 331 N. Y. S. 2d 735 (2nd Dept. 1972), the Supreme Court decided that, by reason of a stay granted by the Appellate Division and subsequent Notice of Appeal to this Court, proceedings in the Supreme Court were stayed pending determination of the appeal to this Court. Upon appeal the Appellate Division held that the stay continued under a separate provision of law; but the Appellate Division decision left the reasoning of the lower court intact.

The *Ferguson* case involved a situation virtually identical to the case at bar. We respectfully submit that the reasoning of the Supreme Court in the *Ferguson* case should be applied in the case at bar. The stay granted by the Appellate Division on November 21, 1975, should be considered continued pursuant to §5519 (e) pending the determination of this Court on this appeal.

POINT V

IN ANY EVENT, APPELLANTS SHOULD BE GRANTED A STAY  
PENDING DETERMINATION OF THE APPEAL

Whether or not the Appellate Division stay continues automatically pursuant to CPLR §5519(e), it is respectfully submitted that proceedings to dispossess Appellants from their premises should be stayed pending determination



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of the appeal by this Court. We have already demonstrated that the appeal presents a substantial constitutional question and properly lies as of right. Unless proceedings to dispossess Appellants are stayed, the ultimate decision of this Court will have no practical significance. Appellants would be forced out of the premises; and undoubtedly would go into bankruptcy. In order to preserve the subject matter of the appeal to this Court, and to prevent irreparable harm to Appellants, it is respectfully submitted that proceedings to dispossess the Appellants from their premises should be stayed in any event, pending determination of this appeal.

## CONCLUSION

In view of the foregoing, this motion should be granted in all respects and proceedings to execute the order on appeal should be stayed pending determination of the appeal by this Court.

Respectfully submitted,

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**Exhibit E, Annexed to Affidavit of Leonard Olarsch.**

(42357)

*To be argued by*  
LEONARD OLARSCH  
(20 minutes)

**SUPREME COURT OF THE STATE OF NEW YORK**

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

---

IN THE MATTER OF THE APPLICATION

*of*

THE CITY OF NEW YORK, relative to Writs of Assistance required for a project known as COLLEGE POINT INDUSTRIAL PARK URBAN RENEWAL PROJECT II within the area bounded generally by 15th Avenue, Whitestone Expressway, Flushing River, Flushing Bay, 28th Avenue, etc., in the Borough of Queens, City of New York, including title to street areas where the title in fee for street purposes has not been heretofore acquired by The City of New York.

MHG ENTERPRISES, INC., and other condemnees  
in possession,

*Appellants,*

—against—

THE CITY OF NEW YORK,

*Respondent.*

---

**RESPONDENT'S BRIEF**

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SUPREME COURT OF THE STATE OF NEW YORK

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*Appellants,*

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RESPONDENT'S BRIEF

*Exhibit E, Annexed to Affidavit of Leonard Olarsch*

STATEMENT

Appellants, condemnees in possession, appeal from an order of Supreme Court, Queens County (Castaldi, J.), entered October 7, 1975, denying a motion to vacate a consent order of possession entered March 10, 1975 pursuant to stipulation.

ISSUES

Basically, this is an appeal from a consent order of possession. All subsequent orders, including the one appealed from, while denying requests to vacate, merely extended appellants' time of possession by staying enforcement of the Writ of Assistance.

Appellants urge that although the stipulation embodied in the consent order provides for particular dates of possession upon the happening of particular events, which have already occurred, it was their "understanding" that they would be permitted to remain in possession until some unspecified future time when the appellate process relative to their fixture claim had been fully exhausted and their award in hand.

The City urges that the appellants be required to abide by their agreement since any further delay would cause irreparable harm to the City.

Ordinarily, the test applicable on review of the granting of a Writ of Assistance is whether such grant was a proper exercise of discretion. Here, however, the question narrows to whether appellants have made a showing that reformation of the terms of the written stipulation, entered into through and with the advice of counsel, in writing, and for valuable consideration, is called for. Moreover, assuming, *arguendo*, that it were to be vacated

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entirely, then, based on the relative equities of the parties, did the Court's granting of possession constitute a proper exercise of discretion?

FACTS

(1)

Appellants are owners and operators of amusement rides located on land within the College Point Industrial Park Urban Renewal Area (204). The major portion of this land, located to the west of a drainage ditch, was owned by the City of New York, which had granted appellant MHG a month-to-month permit for parking purposes on a portion of this land in 1971 (204-205). Contrary to the permit restrictions and with prior knowledge of the impending condemnation, MHG placed amusement rides on the land and used it, in conjunction with the rides already located on their own land lying to the east of the drainage ditch, as an amusement park (211). On the larger portion of this City-owned land, not even covered by the permit and owned by the City prior to title vesting, MHG also installed portable amusement rides (151). In short, MHG was and still is a squatter on a large tract of land owned by the City even prior to condemnation.

Any interest appellants might have had in the land they were squatting on or the land they were occupying under the permit, was terminated upon vesting of title in 1972 (150-151). In April, 1974, title to the land owned by appellants in fee and used as part of the amusement park, also vested in condemnation (*id.*).



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(2)

In September, 1974, the City moved for the instant Writ of Assistance to compel appellants to remove the amusement rides and surrender possession in order to enable the City, through its agent, the Public Development Corporation (PDC), to proceed with its development of this urban renewal area (190).

On March 10, 1975, this proceeding was settled in open court by agreement of the parties and embodied in a stipulation providing that the portable rides on the restricted permit land and the illegally occupied City-owned land would not be removed until "after May 5, 1975, the advanced trial date fixed by the Court . . ." The consideration for this promise as contained in the stipulation was that the trial of the fixture claim would be expedited and commenced on May 5, 1975 with submission of appraisals by April 25, 1975 (195-197).

Appellants also agreed that they would discontinue operations and surrender possession of that land previously owned by them in fee at the "close of the amusement park season in the Autumn of 1975 but in no event later than November 1, 1975", with one proviso, that the City shall not remove the rides until it "has submitted . . . appraisals . . . to the Court . . . [and] to counsel" (198-199). The terms of the stipulation were embodied in a *consent* order of the Court entered on the same day, March 10, 1975 (190-193).

The Court, however, under its inherent power to continually supervise execution of the writ, refused to put the City into possession until conclusion of trial and rendering of its decision as to the rides located on the former City-owned land. Thus a number of stays were granted appellants until such decision was rendered.

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The Court repeated over and over again through the course of all subsequent proceedings that the object of the stipulation and order was to expedite the trial on the permit and former City-owned land and to enable the Court to render an early decision (28, 40, 50, 80, 82, 86). On claimant's former fee owned land all that was required was, submission of the City's fixture appraisal and claimants removal by November 1, after the amusement park season ended (198-199).

The City kept its end of the bargain in all respects; appraisals were exchanged, the trial expedited, decision rendered and appellants permitted to finish out the amusement park season on the former privately owned land. As it turned out, they also finished the season on the former City-owned land (201).

Between the date of entry of the consent order (March 10, 1975) and the date the Court rendered its decision as to the portable rides on the former City-owned land (November 3, 1975), appellants were granted a further stay to October 1, 1975, which was subsequently enlarged to November 1, 1975, by the order of October 7, 1975, appealed from herein (9-11).

The Court in its decision found that the amusement rides on the City-owned land were portable, non-compensable personal property (202-213). The Court again enlarged the stay for all the land, whether squat, permit or former fee, to November 25, 1975, to afford appellants adequate opportunity to remove their portable equipment (201).

By order entered November 21, 1975, this Court granted appellants a further stay of possession conditioned upon their perfecting this appeal for the February Term.

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DECISION OF THE LOWER COURT

Simultaneously with its decision denying the claim for fixture compensation for the rides on the City-owned land, the Court (*Castelli, J.*) granted a final stay of execution of the Writ of Assistance until November 25, 1975 (201).

This was based upon the agreement of the parties and "all of the circumstances, with emphasis on the practicalities of the situation . . ."

After considering "the voluminous papers submitted in his long pending application", the Court concluded that (*id*):

"From the outset, the objective of the occupants of the subject premises was twofold. They sought to remain undisturbed in their possession of the premises for the duration of the amusement park season and until the court decided the condemnation proceeding involving certain amusement rides and other items. Both events have now occurred excepting a determination affecting the 'other items.'"

The Court alluded to its decision holding the amusement rides on the leased land "not compensable . . . belonging] to the owner-occupants", stating that (*id*):

"viewed realistically, the court's decision means that the owners must now take such action as they deem appropriate with respect to the rides on the subject premises."



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## POINT I

APPELLANTS HAVE FAILED TO ESTABLISH THAT REFORMATION OF THE STIPULATION WAS CALLED FOR OR THAT EQUITY REQUIRED THE SETTING ASIDE OF THE CONSENT ORDER.

## (1)

On December 1, 1972, April 3, 1974 and June 24, 1974, the City acquired title to the subject land in stages for this urban renewal project (150-151).<sup>\*</sup> Administrative Code § B15-36.0 (2 Williams Press, 1971 ed., p. 562) provides for immediate possession of such land upon vesting of title in order to put it to the use for which it was acquired (§ B15-36.0, subd. c):

"The city or any person acting under its authority, or the agency which upon the acquisition of title to such real property will have jurisdiction thereof, shall immediately or any time thereafter take possession of such property without suit or other judicial proceedings."

Thus, when the City is ready to implement the improvement, it may immediately take possession and the possessor, under the code, must comply. If it does not, as here, then the City can physically seize possession or seek the aid of the court in the form of an execution to the sheriff directing delivery of possession to the City.

Such execution, called a Writ of Assistance, is authorized by § 221 Real Property Actions and Proceedings Law, which provides that after a judgment decrees fee

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<sup>\*</sup>To be precise, all land which the City owned in fee prior to title vesting in condemnation was merely cleared of all adverse interests and a declaration made that all lands were now being held in fee for a specified public purpose.

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title, and “\* \* \* a party \* \* \* who is bound by the judgment, withholds possession from the person thus declared to be entitled thereto”—

“[T]he court, by order, in its discretion, besides punishing the disobedience as a contempt, may require the sheriff to put that person into possession. Such an order shall be executed as if it were an execution for the delivery of the possession of the property.”

(2)

Ordinarily, on review, the propriety of issuance of the writ will not be disturbed unless it constitutes an “abuse of discretion” (discussed in Point II, *post*). At bar, however, the parties stipulated to the specific dates of possession and consented to entry of an order embodying such agreement (190-200). Hence, there was no occasion here to even exercise discretion or to consider the relative equities of the parties. In short, any question as to the City’s need for immediate possession was obviated by the stipulation. Cf. *People v. McKnight*, 131 N Y S 2d 203 (Sup. Ct., Kings Co., 1954 n.o.r.), *aff’d* 284 App. Div. 892 (2nd Dept., 1954), where it was held that the defendant could no longer raise plaintiff’s failure to serve a complaint, after entry of a consent order. Similarly obviated by the stipulation was any question as to the possessor’s alleged hardship.

At bar, appellants admit that a stipulation was executed and that they consented, through counsel, to entry of an order in accord with the stipulation. They take issue, however with the Court’s interpretation of it (App. br. p. 11).

In effecting that stipulation, appellants sought two objectives in exchange for their agreement to surrender pos-

*Exhibit E, Annexed to Affidavit of Leonard Olarsch*

session: 1) to operate their amusement park through the 1975 season; 2) to expedite exchange of fixture appraisals on all parcels as well as the trial and decision as to the amusement rides located on the squat and permit lands.

Acting thereon, the City expedited exchange of appraisals and the Court rendered an early decision as to the amusement rides on the squat and permit land on November 3, 1975 (201, 174-175). Judge Castaldi described the stipulation as follows (40):

"it boiled down to a situation where the court was asked to proceed with the trial in condemnation and render a decision, and not to have the occupant of the subject premises vacate until after the decision by this court in condemnation. Now, that is what it all came down to, Mr. Goldstein." (See also, 32-33, 38-40).

When confronted at the hearing with claimant's contention that the agreement contemplated exhaustion of the appellate process, Judge Castaldi said (30):

"... you are too able a lawyer to have been a party then to a stipulation which contemplated final determination exhausting the appellate process, and still have an order signed with a date that was fixed in the original order."

To cap it off, claimants' counsel admitted that (32):

"we did not even contemplate an appellate process at that time" (i.e., when the agreement was made).

This admission of counsel who signed the stipulation certainly eliminates any possible claim that the appellate process was covered by the agreement. Clearly it was not. Under these circumstances, the court is without power to supply terms, provisions or essential details not previously agreed to by the parties. *Matter of Shlakman*



*Exhibit E, Annexed to Affidavit of Leonard Olarsch*

*v. Bd. of Educ.*, 5 Misc 2d 901, 906 (Sup. Ct., Kings Co. 1957); *Dawn Frosted Meats, Inc. v. Insurance Co. of No. Am.*, 62 M 2d 995, 997 (Sup. Ct., N.Y. Co., 1970), aff'd 36 A D 2d 580 (1st Dept., 1971).

## (3)

In most cases, entry of a consent judgment leaves the court powerless to change it. See, e.g., *Saxton v. Schaffer*, 279 App. Div. 1134 (4th Dept., 1952). Appellants, however, are correct in that the court always has inherent power to relieve a party from the effect of a consent judgment to avoid injustice. Thus in *Goldstein v. Goldsmith*, 243 App. Div. 268 (2nd Dept., 1935) relied on by appellants, a \$10,000 claim was settled for \$10,000 and embodied in a consent order providing for periodic payments of the \$1,000, with default authorizing entry of judgment for the full \$10,000. A check for \$75 in partial payment was returned by the bank for insufficient funds because the covering deposit did not reach the bank in time. Obviously, an inadvertence precipitating such harsh penalties warranted court intervention. See also, *Shermane Corporation v. Susan Prince, Inc.*, 76 N Y S 2d 17 (Mun. Ct., N.Y. Co., 1948). There is nothing remotely similar presented here.

At bar, the court, exercising its inherent equitable power, continually stayed execution of the consent judgment until it had rendered its decision. Appellants have failed to show that under equitable principles, the court was required to do more.

*Exhibit E, Annexed to Affidavit of Leonard Olarsch*

## POINT II

EVEN ASSUMING THE CONSENT ORDER SHOULD HAVE BEEN COMPLETELY VACATED, THERE WAS NO ABUSE OF DISCRETION IN GRANTING POSSESSION AS OF NOVEMBER 25, 1975.

## (1)

In discussing the lack of merit in claimants' "equity" arguments, we put aside the stipulation, as well as the City's statutory right to possession. Concededly, granting a Writ of Assistance or a stay is discretionary with the court, absent agreement of the parties. Real Property Action and Proceeding §221. See, *Long Island City Savings and Loan Assn. v. Levene*, 138 N Y S 2d 573, 577 (Sup. Ct., Nass., Co., 1955 n.o.r.; *Kilpatrick v. Argyle Co., Inc.*, 199 App. Div. 753, 759 (1st Dept., 1922).

At bar, the Court gave extensive consideration to appellants' claim that they would go bankrupt, if required to move prior to obtaining a "bankable award."\* They claim that they must secure a "bankable award" or continue running their amusement park so that they will not default in payments to conditional vendors of the rides (29). Significantly, the amusement park season runs for only a portion of the year, and for the balance of the year the rides are dismantled and stored (159). Appellants have already had sufficient time to relocate the portable rides to other locations in order to continue operations. They knew, since title vesting in 1972, that they would be required to vacate the premises.

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\*"Bankable award" is appellants' description of an award upon which they would secure a bank loan (27). And they argue that where, as here, they are awarded nothing for portable items, the "bankable award" must await appellate review before it can appear.

*Exhibit E, Annexed to Affidavit of Leonard Olarsch*

Insofar as the permit lands are concerned, their occupancy was terminable on thirty days notice whether or not there was a condemnation. Moreover, "as early as August, 1970", appellants knew of the impending condemnation (211). Notwithstanding such knowledge, they installed amusement rides under a permit restricted to parking use (*id.*).

The court, in its decision denying fixture compensation for these portable rides, concluded that "claimants took a calculated risk when they installed their rides with knowledge of the impending condemnation and that they "gambled that they would be permitted to retain their rides as part of the overall development of the industrial park" (212).

According to Harold Glantz, it really wasn't much of a gamble at all. He admitted that although he knew condemnation was in the offing when he installed the rides, "even if I was there [on the leased property] two, three years, it would have paid" (*id.*). In fact, appellant did not even pay rent—since it was to be deducted from the ultimate award (94-95)—and already owes the City \$120,000 in rent arrears (*id.*).

The amusement business apparently paid so well that the claimants even installed rides on City land without any colorable right whatever. And that is why, we find claimant's counsel admitting that he was trying to "wriggle and squirm to find a way to stave off what we fear will be a dreadful situation" (56-57). The amusement park operation was apparently so lucrative that claimants desired to continue it, regardless of any losses or damage to the City in preventing use of its own property. As claimant's counsel said on November 19, 1974, "we want another season here" (36), which in fact, he did obtain. Now he is before this Court asking for yet another season. Since Mr. Glantz admitted that opera-



*Exhibit E, Annexed to Affidavit of Leonard Olarsch*

tion for only two seasons "would have paid," his argument concerning impending bankruptcy is, to say the least, spurious. He has had more than two seasons, and presumably it has paid as anticipated.

(2)

As to the City's need for possession, a \$50 million expenditure has been contracted, and several million dollars already expended, for the land's planned reuse as an industrial park (156-7; 155-9). The project calls for development of 560 acres as "the lead industrial park in the City's plans for providing economic expansion" which "is intended and is proving to be a showcase model industrial park . . ."

Presently there is an on-going contract between the City, PDC and Earth Bank Co., Inc. to fill the area, which work has been in continuous progress since August 18, 1972, and for which payment has been made up to date (156). This work has so far progressed that appellants' parcels are next to be filled. In fact it is exceedingly critical that the subject lands now be filled because the two main drainage ditches serving the College Point area converge on this property (156-157). If this land remains unfilled, surrounding lands cannot be stabilized and the project for which the City is obligated or has already expended over fifty million dollars cannot proceed (*id.* 185-186). Claimants' possession plainly obstructs this project and, if it continues, will require the City to relet the fill contract at higher prices.

Delay causing large financial loss to the City and postponement of a public improvement has been found to warrant issuance of a Writ of Assistance. *In re Connecting Highway (Laurel Hill Blvd., Bklyn.)*, N.Y.L.J. May 9, 1941, p. 2092, col. 5 (Sup. Ct., Kings Co.). It has

*Exhibit E, Annexed to Affidavit of Leonard Olarsch*

also been found that notwithstanding difficulty confronting commercial tenants, a writ would issue so as not to further delay construction, with the proviso that possession would not be required until the City was ready to proceed. *In re Port of N. Y. Authority (Port Authority Motor Bus Terminal)*, N.Y.L.J. May 6, 1948, p. 1701, col. 2F (Sup. Ct., N.Y. Co.). Clearly that is the case here. Funds are available and the contractor is ready to fill the subject land, which work is necessary for project continuity (186).

Certainly, the City's right to complete one of the few remaining public improvements still being actively implemented without incurring prohibitive costs, is entitled to greater weight than claimants' "one more season." They have already had at least three—and the City should finally be allowed to use its own property, as directed by the Court below.

The prejudice to claimants is certainly not as great as they would have this Court believe. In this regard, under the cases of *City of Buffalo v. Clement*, 28 N Y 2d 241, 261 (1971); *Rose v. State*, 24 N Y 2d 80, 86 (1969); and *In re City of New York (Metropolitan Hospital)*,—A D 2d — (N.Y.L.J., May 21, 1975, p. 2, col. 3, 1st Dept.), the compensation formula for removable items, such as portable rides readily capable of removal, is the lesser of in-place value or relocation costs (24 N Y 2d at p. 88).

If appellants were to relocate the rides from their formerly owned lands today, they would be entitled to unlimited relocation costs for personalty under the schedule adopted pursuant to 1160-1.06 of the Administrative Code. That is precisely the same compensation they would receive under the *Rose* formula, if after trial, these rides were held to be compensable fixtures.

*Exhibit E, Annexed to Affidavit of Leonard Olarsch*

(3)

Claimants here invoke the State Condemnation Law §24, authorizing possession "where the public interest will be prejudiced by delay," despite the fact that the public interest will be prejudiced by further delay herein. In addition they ignore the fact that §27 of the State Condemnation Law expressly excludes the City's Condemnation procedure from the provisions of the Condemnation Law. *City of Buffalo v. Clement Co.*, 28 N Y 2d 241, 262-4 (1971). The Administrative Code provides for immediate possession upon vesting of title (§B15-36.0 *supra*). *In re City of New York (New Municipal Bldg.)*, N.Y.L.J., 2/10/69, p. 2, col. 4f, contrary to appellants' contention, does not hold that §24 applies to City Condemnation proceedings. It merely holds that one of the factors considered in granting the writ is whether construction will proceed. Based upon the submission to the lower Court, it was amply warranted in granting the City possession as of November 25, 1975, herein.

(4)

Finally, claimants raise the specter of City insolvency and argue that possession is constitutionally required until the awards have been paid—even if this means years of delay for appeals purposes (Br., pp. 19-23).

It is basic that constitutionality may not be challenged by one who simultaneously pursues the benefits of the allegedly unconstitutional act. See *Matter of Diocese of Rochester v. Plan. Bd.*, 1 N Y 2d 508, 520 (1956); *Vernon Park Realty v. City of Mount Vernon*, 307 N. Y. 493, 501 (1954).



*Exhibit E, Annexed to Affidavit of Leonard Olarsch*

In other words, appellants must either claim that the taking is unconstitutional because just compensation is insecure, or acknowledge a valid taking has occurred for which they are entitled to just compensation. That they have already chosen the latter course is apparent since they seek to exhaust the appellate process in an attempt to obtain just compensation for claimed fixtures alleged to have been taken by the City in this condemnation proceeding.

The well-publicized financial problems of the City are of no aid to appellants because the City has and still is paying its debts as they come due and is in all respects solvent. This was the case on title vesting date, as it is today.

The very cases cited by appellants stand for the basic proposition that the condemnor is entitled to possession upon formal vesting of title, without requirement of simultaneous payment, unless qualified by State Constitution or statute. See cases relied on by claimants themselves—*Kennedy v. Indianapolis*, 103 U. S. 599, 603 (1880); *Sage v. City of Brooklyn*, 89 N. Y. 189 (App. Br., pp. 19-20).

While the basic requirement for deferring payment after vesting is that a reasonable certainty of payment exists, "absolute certainty" is not required as it "would mean that payment must never be deferred after 'the taking.'" *Goodrich Sales Electric Co. v. Howard*, 171 A. 761, 767 (S. Ct., N.H., 1934).

The solvency of a municipal corporation is presumed and "all that is required is that a remedy be provided to which the property owner may resort to have his proper compensation assessed and paid." *St. Joseph & G. I. Ry. Co. v. City of Hiawatha*, 148 Pac. 744 (Sup. Ct., Kans., 1915). In *Colby v. City of Spokane*, 42 Pac. 112 (Sup. Ct. Wash., 1895), the court refused to enjoin

*Exhibit E, Annexed to Affidavit of Leonard Olarsch*

the laying of pipes on private property in advance of award, stating (p. 113):

"It was not made to appear that the defendant, the City of Spokane was insolvent, or that full compensation for the illegal acts charged could not be had in an action at law."

At bar, appellants do not alleged that the City is insolvent or that the statute authorizing condemnation does not make adequate provision for compensation. They speculate as to the possibility that the moratorium laws recently passed by the Legislature might not be sustained, thereby placing the City's finances in a "precarious position" (App. Br., p. 21). Aside from the court's recent decision upholding these moratorium laws, *Flushing National Bank v. Municipal Assistance Corp.*, N.Y.L.J., Dec. 24, 1975, p. 6, col. 2 (S. Ct., N. Y. Co.), speculation as to whether or not the City will have means to pay the award is insufficient to vitiate its power of eminent domain. In *De Lucca v. City of North Little Rock*, 142 F. 597, 605 (Circ. Ct., E. D., Ark., 1905), the Court said "In the absence of stronger allegations clearly showing the insolvency of a municipal corporation,\* courts would not be justified in assuming that fact."

Thus, it is uniformly held that speculation as to a municipality's finances, absent a clear showing of insolvency, may not be invoked to undermine its power to acquire property for public improvements in advance of award. See *City of Marshall v. Allen*, 115 S. W. 849, 853 (Ct. of Civ. App., Tex., 1909) where this policy was fully discussed (p. 853):

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\*The case of *Dormitory Authority of the State of New York v. 59th St. & 10th Ave. Realty Corp.*, — A. D. 2d — N.Y.L.J., 12/22/75, p. 6, col. 4 (1st Dept.), cited by appellants, is not relevant because the Dormitory Authority, unlike the City of New York, has no taxing power but is solely dependent upon the sale of its bonds. See Public Authorities Law §1681 *et seq.*

*Exhibit E, Annexed to Affidavit of Leonard Olarsch*

"Tests resorted to, to determine whether an individual is solvent or insolvent, we think, cannot be applied to determine the solvency or insolvency of a municipal corporation. The solvency of the individual usually is determinable by the proportion the value of his property bears to the sum of his debts. Such a test could not be applied to a municipal corporation. Ordinarily its own property holdings are not of great value, and are not reachable by legal process in satisfaction of its debts. To secure funds for the payment of obligations it incurs it must rely mainly upon its taxing power. Because its taxing power might be so limited as to make it impossible for a municipal corporation to provide funds with which to meet as they mature all its obligations, we think would not furnish a reason for holding it to be insolvent. The purpose for which such corporations exist, and the policy which denies to them unlimited taxing power, forbid the accumulation and possession by them of funds not presently needed in the proper conduct of their affairs. It must frequently happen, therefore, that such a corporation while in a good financial condition is unable at once to satisfy as it matures every obligation it has incurred. Because it cannot do so does not prove it to be insolvent. It is not unable to pay in any event, but merely to pay at the particular time the debt is due. If while in such a condition it should be treated as insolvent, and visited with the disabilities attached to insolvency, the corporations necessarily would fail to fully accomplish the purpose for which it existed. The facts that such a corporation is a 'going concern,' is performing all its governmental functions, and the further facts that it has been able, as the judge found the city of



*Exhibit E, Annexed to Affidavit of Leonard Olarsch*

Marshall had been able, to meet its obligations, ought in a proceeding like this, we think, to entitle it to be regarded and treated as solvent."

See also, *Sheffield v. Town of Duncanville*, 236 S W 2d 851, 853 (Ct. Civ. App., Tex., 1951); *Wallace v. New Castle Northern Ry. Co.*, 22 A. 95 (S. Ct., Pa., 1890).

Appellants do not dispute the City's solvency nor have they offered proof, as required by most authorities, that it is insolvent and cannot pay an award. Clearly, if appellants were able to stifle a public improvement by speculation concerning fiscal problems, which is scarcely a novel phenomenon to municipalities, a serious disability would be visited upon all municipalities in the performance of their governmental function. Therefore, such conjecture should not be given legal sanction in any form, either as vitiating an acquisition, or, as here, barring construction of a public improvement by withholding possession of property duly acquired in condemnation.

Moreover, appellants are not now entitled to any award for fixtures on the City owned or previously fee owned lands. As to the former, the Court ruled them to be non-compensable personal property. As to the latter, trial has not been held and no award is therefore due. Presumably these rides will similarly be held removable and, therefore, non-compensable, as were the ones already tried. However, as previously noted, relocation expenses for personalty is immediately available to appellants if they remove the rides on their formerly owned land. Additionally, warrants are available for advance payment for the land acquired, which is subject to liens.\* Moreover, it should be noted, that any award appellants may

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\*Warrants numbered 5-188309-17 totalling \$1,068,712.33 were made available for collection by the Comptroller on July 23, 1975.

*Exhibit E, Annexed to Affidavit of Leonard Olarsch*

ultimately become entitled to must be offset by rent arrears that now total approximately \$120,000.

Under these circumstances, claimants' specious grounds for further delay to secure yet another season to operate their amusement park, in continued violation of their stipulation and injury to the City, should be rejected.

CONCLUSION

THE ORDER SHOULD BE AFFIRMED, WITH COSTS, AND THE CITY OF NEW YORK GRANTED IMMEDIATE POSSESSION OF THE PROPERTY.

January 2, 1976

Respectfully submitted,

W. BERNARD RICHLAND,  
*Corporation Counsel,*  
*Attorney for Respondent.*

L. KEVIN SHERIDAN,  
MORRIS EINHORN,  
LEONARD OLARSCH,  
*of Counsel.*

**Exhibit F, Annexed to Affidavit of Leonard Olarsch.**

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 23, 1976.

Hon. M. Henry Martuscello,  
Acting Presiding Justice,  
Hon. Henry J. Latham,  
Hon. John P. Cohalan, Jr.,  
Hon. Samuel Rabin,  
Hon. Vito J. Titone,  
Associate Justices

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IN THE MATTER

of

THE CITY OF NEW YORK (College Point Industrial Park  
Urban Renewal Project II, Borough of Queens).

MHG ENTERPRISES, Inc. *et al.*,

*Appellants,*

*v.*

THE CITY OF NEW YORK,

*Respondent.*

---

In the above entitled cause the above named MHG Enterprises, Inc. *et al.*, the condemnees in possession, having appealed to this court from an order of the Supreme Court, Queens County, dated October 7, 1975, which, *inter alia*, denied their motion to set aside two prior orders of the same court, which orders directed them to vacate the subject premises; the said appeal also brings up for review



*Exhibit F, Annexed to Affidavit of Leonard Olarsch*

a further order of the same court, dated November 19, 1975, which, *inter alia*, denied appellant's motion for leave to renew; and the said appeal having been argued by Howard M. Squadron, Esq. of counsel for the appellants, and argued by Leonard Olarsch, of counsel for the respondent, and due deliberation having been had thereon and upon the court's opinion and decision slip heretofore filed and made a part hereof it is

ORDERED that the order dated October 7, 1975, appealed from and the order dated November 19, 1975 are hereby unanimously affirmed, with one bill of \$50 costs and disbursements, and the proceeding is hereby remanded to Special Term for further proceedings consistent with the opinion and decision slip of the court herein, dated February 23, 1975.

Enter

IRVING N. SELKIN  
Clerk of the Appellate Division

*Exhibit F, Annexed to Affidavit of Leonard Olarsch*

Z/mc

— A D 2d —

A—January 30, 1976.

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IN THE MATTER

of

THE CITY OF NEW YORK (College Point Industrial Park  
Urban Renewal Project II, Borough of Queens).

MHG ENTERPRISES, Inc. *et al.*,

*Appellants,*

*v.*

THE CITY OF NEW YORK,

*Respondent.*

---

Squadron, Gartenberg, Ellenoff & Plesent, New York, N.Y. (Howard M. Squadron and Robert M. Kerrigan of counsel), for appellants.

W. Bernard Richland, Corporation Counsel, New York, N.Y. (Leonard Olarsch, L. Kevin Sheridan and Morris Einhorn of counsel), for respondent.

In a condemnation proceeding, the condemnees in possession appeal from an order of the Supreme Court, Queens County, dated October 7, 1975, which, *inter alia*, denied their motion to set aside two prior orders of the same court, which orders directed them to vacate the subject premises. The appeal also brings us for review a further order of the same court, dated November 19, 1975, which, *inter alia*, denied appellant's motion for leave to renew.

*Exhibit F, Annexed to Affidavit of Leonard Olarsch*

Orders affirmed, with one bill of \$50 costs and disbursements, and proceeding remanded to Special Term for further proceedings consistent herewith.

Appellants own and operate an amusement center in Flushing, New York, upon land, a portion of which is owned by them, a portion of which they occupy as lessees and a third portion of which they occupy as squatters. Title to the land in question vested in the City of New York (the City) during the years 1972-1974; but, as early as August, 1970, appellants were aware of the impending condemnation.

The City intends, by acquiring some 560 acres, to develop an industrial park and to provide economic growth for manufacturing and distributing firms. The area is to be a showcase industrial park capable of providing economic markets and job opportunities for New Yorkers. The Public Development Corporation is acting as agent for the City, pursuant to a contract adopted by the Board of Estimate.

At present the City has fulfilled its commitment to those engaged in the enhancement and improvement of the land in question and wishes to complete the project without incurring prohibitive costs which could delay, if not defeat, the entire project. A writ of assistance to gain possession of the land was sought by the City in September, 1974; the result was a stipulation and a consent order, each dated March 10, 1975, which, in effect, permitted appellants to continue in possession pending a condemnation award by the court. Appellants' right to remain in possession was extended up to and including November 25, 1975 by a series of court orders.

Appellants sought to set aside and vacate the stipulation of March 10, 1975, and the order entered thereon, on the grounds that they are being asked to vacate the property without just compensation and without a proper showing of "need". Primarily they argue that the City's fiscal con-



*Exhibit F, Annexed to Affidavit of Leonard Olarsch*

dition is such that they are being deprived of their property in violation of constitutional mandate. They suggest and demand that the City pay in advance for that which it is taking.

The stipulation was executed by experienced counsel and with the court's approval. Appellants' argument that the same is ambiguous, or was entered into inadvertently or by mistake, is not established by the record on this appeal. Although we recognize the City's fiscal problems, there has been no showing that it is unable or unwilling to fulfill its legal commitment to properly compensate appellants for the property condemned.

In *Brewster v. Rogers Co.* (169 N. Y. 73, 80), the court stated:

"It was settled early in the history of this state that when private property is taken for public use, compensation need not necessarily precede the appropriation; but it was also settled that where payment does not precede appropriation, it must be secure and certain. (*Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend 9.) The responsibility of the state or of one of its municipal corporations or political divisions is deemed sufficient."

In *Sage v. City of Brooklyn* (89 N. Y. 189), it was held that the full faith and credit of a political division is security for the discharge of a constitutional obligation such as the payment for land appropriated for public use.

Accordingly, we affirm the orders and remand the proceeding to Special Term for the fixing of a new date by which appellants must vacate the subject premises. This proceeding should be finalized as soon as practicable.

Martuscello, Acting P.J., Latham, Cohalan, Rabin and Titone, JJ., concur.

February 23, 1976.

**Exhibit G, Annexed to Affidavit of Leonard Olarsch.**

**COURT OF APPEALS,**

**STATE OF NEW YORK.**

*Decisions.*

April 27, 1976

*Cases*

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Mo. No. 319

IN THE MATTER

of

The Application of THE CITY OF NEW YORK, relative to  
Writs of Assistance required for a project known as  
College Point Industrial Park Urban Renewal Project  
II &c.

MHG ENTERPRISES, Inc., and other condemnees in  
possession,

*Appellants,*

*vs.*

THE CITY OF NEW YORK,

*Respondents.*

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On the Court's own motion, appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

Motion for an order indicating the Appellate Division stay herein to have been automatically continued pursuant to CPLR 5519(e) or, in the alternative for a stay pursuant to court order, dismissed as academic.

**Exhibit H, Annexed to Affidavit of Leonard Olarsch.**

*Memorandum Decision, Dated November 3, 1975.*

SUPREME COURT,

QUEENS COUNTY,

Special Term, Part 4.

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MATTER

*of*

THE CITY OF NEW YORK, relative to Writs of Assistance  
required for a project known as College Point Industrial  
Park Urban Renewal Project II, etc.

Index No. 14056/72 (Stage I)

Index No. 3088/74 (Stage II)

Index No. 6439/64 (Stage III)

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Dated November 3, 1975

By CASTALDI, J.:

From the voluminous papers submitted in this long pending application by the City for a writ of assistance, this much is clear. From the outset, the objective of the occupants of the subject premises was two-fold. They sought to remain undisturbed in their possession of the premises for the duration of the amusement park season and until



*Exhibit H, Annexed to Affidavit of Leonard Olarsch*

the court decided the condemnation proceeding involving certain amusement rides and other items. Both events have now occurred excepting a determination affecting the "other items". In the decision in the condemnation proceeding rendered simultaneously herewith, the court holds that the amusement rides are not compensable and that they belong to the owners-occupants. Viewed realistically, the court's decision means that the owners must now take such action as they deem appropriate with respect to the rides on the subject premises.

Under all of the circumstances, with emphasis on the practicalities of the situation, the court grants the immediate motion brought on behalf of the affected occupants to the extent of directing that the occupants be given a further and final stay of execution of any writ of assistance until November 25, 1975.

Settle order.

MICHAEL J. CASTALDI  
J. S. C.

*Exhibit II, Annexed to Affidavit of Leonard Olarsch*

*Stipulation, Dated March 10, 1975.*

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF QUEENS.

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IN THE MATTER

of

The Application of THE CITY OF NEW YORK, relative to Writs of Assistance required for Project known as College Point Industrial Park Urban Renewal Project II Stage I, Stage II and Stage III within the area bounded generally by 15th Avenue, Whitestone Expressway, Flushing River, Flushing Bay, 28th Avenue, etc., in the Borough of Queens, City of New York, including title to street areas where the title in fee for such purposes has not been heretofore acquired by the City of New York.

Index No.

14056/72 (Stage I)

3088/74 (Stage II)

6439/74 (Stage III)

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IT IS HEREBY STIPULATED, CONSENTED AND AGREED to by and between the Attorneys for the Petitioners and the Respondents in the above entitled application for Writs of Assistance, as follows:

WHEREAS, after numerous conferences and hearings held by the Court and it being agreed between all counsel and the Court at a conference held on March 4, 1975, that a

*Exhibit H, Annexed to Affidavit of Leonard Olarsch*

trial date with respect to the condemnation claim and fixture claim of the appropriate Respondents having been advanced to May 5, 1975;

AND, in respect thereof, the City of New York having agreed to expedite appraisals for said fixtures and equipment for the first phase of the site and to submit such appraisals on or before April 25, 1975.

IT IS FURTHER AGREED as follows:

1. All Respondents who presently occupy and use various parcels of land duly owned and acquired by the City of New York within the College Point Industrial Park in the Borough of Queens within the area described in the above entitled application agree to be bound by the terms of this Stipulation and the Order of Possession herein.

2. Upon entry of the Order of Possession to be signed by this Court in the above entitled application, said Respondents shall discontinue and cease all operations, maintenance and use of any and all facilities lying westerly of a certain drainage ditch coursing northerly and southerly, located primarily in Blocks 4331, 4332, 4333 and in Blocks 4301, 4302, 4303 and 4304 in the College Point Industrial Park in the Borough of Queens of land formerly owned in rem by the City of New York.

3. In respect of such land, it is agreed that upon entry of said Court Order, one of the Petitioners herein, New York City Public Development Corporation (hereinafter called PDC) and/or its agents are permitted to enter forthwith upon the lands located westerly of the aforementioned described drainage ditch for the purpose of commencing a major landfill program and operation now being performed by PDC within the College Point Industrial Park in the Borough of Queens.



*Exhibit II, Annexed to Affidavit of Leonard Olarsch*

4. It is further agreed that PDC and/or its agents shall not remove or disturb such rides, fixtures and equipment located on the lands hereinabove described westerly of the drainage ditch upon which the Petitioners are granted possession, until after May 5, 1975, the advanced trial date fixed by the Court in respect of the condemnation and fixture claim of the appropriate Respondents.

5. It is further agreed that PDC and/or its agents may have a limited right of entry without further required notice on the lands of Respondent on the easterly bank of said drainage ditch for the purpose of maintenance and clearance of said drainage ditch and that PDC and its agents may bring required equipment onto such easterly side for the purpose of maintenance and clearance of such drainage ditch during the course of performance of the landfill program and operation herein.

6. It is further agreed that the Petitioners herein will provide an area of approximately 80,000 sq. ft. located primarily in Blocks 4336, 4337 and 4339 within the College Point Industrial Park in the Borough of Queens for temporary use as an adjacent parking lot adjacent to an existing parking lot presently used by Respondents in the conduct of their amusement park business to the close of the amusement park season in the Autumn of 1975. Respondents agree to vacate such land without further notice or order upon the close of the amusement park season in Autumn of 1975. Respondents further agree to erect, at their own cost and expense, and to remove, at their own cost and expense, any fencing required for such parking lot and that in any event Petitioners are to bear no cost and expense with regard to the making available of such land in use thereof by Respondents. Respondents further agree to extend their insurance and liability coverage to cover the benefit of Petitioners in respect to the use, occupancy and operation of such land made available hereunder.

*Exhibit H, Annexed to Affidavit of Leonard Olarsch*

7. It is further agreed that in respect of such lands occupied by Respondents and used by them in the conduct of their businesses located within the College Point Industrial Park, in the Borough of Queens, that presently and/or formerly used by them in the remainder of Blocks 4331, 4332 and 4334 and in Blocks 4306, 4307, 4308, 4310, 4336, 4337, 4339, 4363 and 4364, that with respect thereto without further notice or order of this Court, that they herewith agree to discontinue and cease operations, maintenance and use of all such facilities and to quit same at the close of the amusement park season in the Autumn of 1975 but in no event later than November 1, 1975. That in consideration thereof, the Petitioner, the City of New York, agrees to expedite and accelerate the completion of all appraisal work in respect of fixtures and equipment located in the areas described in this paragraph and to submit same for the Court's consideration as speedily as possible. Such work is presently in progress. In any event, it is further agreed that PDC shall not remove, disturb or alter such rides, fixtures and equipment until the Petitioner, the City of New York, has submitted such appraisals for fixtures and equipment to the Court and provided copies of such appraisals to Counsel in the condemnation and fixture award case.

8. Respondents acknowledge that PDC, on behalf of the City of New York, in undertaking commencement of a major landfill improvement program upon lands hereinabove described, that said Respondents have elected, at their own risk, to continue their business operations for the remainder of the 1975 amusement park season and herewith agree to waive any and all claims against Petitioners for any disturbance or disruption of such business as a result of the landfill and engineering work in progress on lands surrendered by them as described in this Stipulation and the Order of Possession.

*Exhibit H, Annexed to Affidavit of Leonard Olarsch*

9. Respondents further agree and consent to PDC's engineers and/or surveyors to make any necessary survey and bench marks on fixtures and equipment of Respondents for the purposes of making measurements of the land-fill installation and Respondents agree to allow the implacement of settlement plates for such purposes.

10. It is further agreed and understood that the Order of Possession of the Court shall be peremptory as against the Respondents herein and said Respondents shall not request, either by Motion, Order to Show Cause or otherwise, any further extension of time to quit said lands under the terms of the Stipulation as hereinabove indicated and as described in the Order of Possession.

Dated: March 10, 1975  
New York, New York

Attorney for Petitioner  
City of New York  
W. Bernard Richland  
Corporation Counsel  
By: JOHN J. TORRUSIO  
Assistant Corporation Counsel

Attorney for Petitioner  
New York City Public Development  
Corporation  
By: MORRIS D. WEINTRAUB, Esq.

SAMUEL GOLDSTEIN & SONS  
Attorney for all Respondents  
By: M. ROBERT GOLDSTEIN, Esq.



**Exhibit I, Annexed to Affidavit of Leonard Olarsch—  
Memorandum by Castaldi, J.**

SUPREME COURT,

QUEENS COUNTY,

Special Term, Part 4.

---

MATTER

of

THE CITY OF NEW YORK, relative to Writs of Assistance  
required for a project known as COLLEGE POINT INDUS-  
TRIAL PARK URBAN RENEWAL PROJECT, II, etc.

Index No. 14056/72 (Stage I)

Index No. 3088/74 (Stage II)

Index No. 6439/74 (Stage III)

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Dated March 15, 1976

By CASTALDI, J.:

In September, 1974 an application was made in the above-entitled condemnation proceeding for a writ of assistance to put the City in possession of certain premises occupied by MHG Enterprises, *et al.*, condemnees, collectively referred to as "MHG".

Title to the subject premises vested in the City pursuant to orders of condemnation entered on December 1, 1972, April 3, 1974 and June 24, 1974.

After the submission of voluminous papers coupled with extended discussions and conferences between the parties and their counsel, and with the court, a consent order was entered upon a stipulation, both dated March 10, 1975, whereby the City's application for a writ of

*Exhibit I, Annexed to Affidavit of Leonard Olarsch*

assistance was granted and the condemnees in possession (MHG) were directed to vacate by November 1, 1975.

By orders dated October 7, 1975 and November 19, 1975, this court refused to vacate the order of March 10, 1975 but granted a stay of execution of the writ of assistance until November 25, 1975.

An appeal was then taken by MHG to the Appellate Division from the orders of October 7, 1975 and November 19, 1975.

Upon application made by MHG to the Appellate Division, that court granted a further stay of execution of the order of possession pending determination of the appeal.

On February 23, 1976 the Appellate Division rendered a decision, and an order was entered thereon, affirming the orders appealed from and remanding the proceeding to this court "for the fixing of a new date by which appellants must vacate the subject premises."

Upon a reading and consideration of all of the briefs on appeal, and in the light of this court's knowledge of the history and factual background of the proceeding, the court fixed March 15, 1976 as the new date by which the condemnees were ordered to vacate the premises.

By order to show cause dated March 5, 1976, returnable on March 9, 1976, the condemnees asked the court to reopen the proceeding and to fix a date beyond March 15, 1976 within which to vacate the premises.

Upon the hearing of the immediate motion, counsel for the condemnees was given full opportunity to give any reasons, in fact or in law, why the proceeding should be reopened and why the time to vacate the premises should be enlarged beyond March 15, 1976. Counsel was also specifically asked by the court "whether there has been any change in circumstances, anything new in this situation, beyond what was presented to the Appellate Division upon the argument of the appeal had on January 30, 1976."



*Exhibit I, Annexed to Affidavit of Leonard Olarsch*

The central theme of claimants' argument on this motion is that no final decrees in condemnation have as yet been entered covering the claimed fixtures on *both* the land leased from the City and on the land owned in fee by the condemnees or their affiliates.

It appears that the condemnees or the City, or both, contemplate an appeal from the final decrees, as and when they are entered, so as to obtain a final appellate determination as to the compensability of the claimed fixtures. Until that is done, and in any event until both final decrees are entered, the condemnees say that they should remain in possession and that the subject fixtures should not be removed or relocated.

The court rejects the suggested proposal. The same argument was advanced before the Appellate Division. The delay incident to the entry of the final decrees followed by prospective appeals might well thwart the completion of the project which has been entrusted to the City's agent, the Public Development Corporation. The delay that the court envisages is real. Indeed, the claimants have not even served upon the Corporation Counsel all schedules of the claimed fixtures on the fee-owned land, and a trial is yet to follow as to those claims.

Claimants also assert that they have not obtained payment of costs for the relocation of the claimed fixtures. This argument, too, was urged upon the Appellate Division.

The City's position upon the argument of the immediate motion is that it wants and is entitled to immediate possession of the premises, and that the City is ready to give the claimants "a reasonable time—reasonable—to remove these fixtures and will aid with any of the subdivisions of the City who are empowered to help them relocate and whatever money they are entitled to they will receive. The City is willing to give them the time. What we want is possession of the premises to which we are entitled." (SM p. 36.)



*Exhibit I, Annexed to Affidavit of Leonard Olarsch*

The City is unquestionably entitled to possession of the premises. The Appellate Division has affirmed that holding. This court finds that there has been no change in the facts, circumstances or arguments that were presented to the Appellate Division. The only question before this court is the date by which the condemnees must give possession to the City. Any problems attendant upon physical removal or relocation of the fixtures can be, and should be, resolved by the parties in a spirit of genuine cooperation without further and needless recourse to the judicial process. There must be finality to this proceeding. This is in keeping with the admonition expressed by the Appellate Division in its decision of February 23, 1976.

The court concludes that the motion made on behalf of all of the condemnees in possession (MHG) must be and is denied in all respects, except that the court now fixes March 22, 1976 as the date by which the condemnees are ordered to vacate and give possession of the premises to the City.

Settle order.

*J. S. C.*

**Affidavit of Richard K. Bernstein in Opposition to  
Plaintiffs' Motion.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

**[SAME TITLE.]**

State of New York,  
County of New York,   ss:

RICHARD K. BERNSTEIN, being duly sworn, deposes and says that he is Executive Director of the New York City Public Development Corporation, a Not-For-Profit local development corporation duly incorporated under the laws of the State of New York. That he is fully familiar with, and in charge of, the College Point Industrial Park Urban Renewal Project and makes this affidavit in opposition to the Order to Show Cause and Temporary Restraining Order dated April 30, 1976.

1. The operators of Adventurer's Amusement Park have been on notice at least since 1970/71 that the amusement park would not be allowed to continue operation in the College Point Industrial Park area. Prior to adoption by the Board of Estimate of the Urban Renewal Plan in September 1971, I informed the then Borough President of Queens, who inquired as to the status of the amusement park, that it would not be permitted to remain but that we would allow two more seasons of operation—namely, the summer of 1972 and the summer of 1973—in order to permit time for an orderly phase-out.

2. In the face of this position, which was consistently maintained by the New York City Public Development Corporation (PDC) and the City, and with the knowledge that the property then privately owned would be condemned and the amusement park operation terminated, the present owner privately purchased the site and very

*Affidavit of Richard K. Bernstein in Opposition to  
Plaintiffs' Motion*

greatly enlarged the amusement park. New rides were placed on City-owned land which the operator had either leased on a temporary month-to-month basis for customer parking or which in effect he squatted on with no legal rights. As a consequence, the largest part of the present amusement park operation is on land which was never in the ownership of the current operators or their predecessors and which they did not make part of the amusement park operation until they had knowledge that the entire operation was contrary to the approved Plan and would be terminated.

3. As a further consequence the amusement park rides and operation are on both the east and west side of the existing drainage canals at the most critical point in the entire drainage system—the point of conjunction of the easterly and westerly drainage canals. A satisfactory solution to the drainage problem of the bowl-like area surrounding the Flushing Airport has always been the key to the development of this strategically located area close to the geographic and population center of the City of New York. Our consulting engineers strongly recommended that we stabilize the area surrounding the conjunction of the drainage canals by the placement of controlled fill at the earliest possible moment under our fill contract which was entered into on August 18, 1972. We have, until now, been able to place only a very limited quantity of fill in this critical area because of unstable soil condition and the continued operation of the amusement park with the temporary nature of the ride structures. We have stretched out our fill contract to its very limits in order to have sufficient fill available to meet the urgent engineering demands in this area. We have an ongoing contract, and the funds to carry it out. We can no longer delay. If we are again thwarted in obtaining



*Affidavit of Richard K. Bernstein in Opposition to  
Plaintiffs' Motion*

possession of the area for the purpose of placing fill the further development of the Industrial Park, in which the City has already invested over \$50 million, will be seriously compromised.

4. The major tenants already in the Industrial Park, such as the Western Electric Company, acquired sites and invested large sums in developing new industrial and commercial buildings with the assurance that the Urban Renewal Plan, adopted after public hearing by the City of New York, would be carried out. This Plan specifically and explicitly called for the removal of incompatible uses, such as junk yards and the amusement park, in order to provide a planned and attractive industrial area in the City of New York to help the City compete with suburban areas and other parts of the country which are draining away our economic life blood.

5. From the beginning, while our position that the amusement park would have to remove has never deviated, we have endeavored to be cooperative. As cited above, we agreed in 1971 to allow two more seasons for an orderly phase-out. We agreed to allow, during this period, the temporary lease of additional City land for parking purposes in order to ease the parking problems of the amusement park both for its operators and the surrounding community. The original two years—the summers of 1972 and 1973—stretched out to three years in 1974 through the first series of legal delaying maneuvers. The operation was supposed to conclude in the winter of 74/75. In the spring of 1975, at the urging of the lower state court, I entered into a stipulation whereby we would gain possession of the west bank of the drainage system by May 5, 1975, in order to commence the placement of fill, but would allow the operation on the east bank to continue throughout that sum-

*Affidavit of Richard K. Bernstein in Opposition to  
Plaintiffs' Motion*

mer to be terminated in the fall. I agreed to initiate certain actions on my part, all of which I did promptly and fully. The other side reneged on its agreement through another series of legal delaying maneuvers and the entire amusement park operation continued through the summer of 1975—the fourth season. Now, with once again the cry of “just one more season”, another series of legal delaying tactics are being initiated. In addition, for carrying out my public responsibilities, I am being personally attacked and threatened. The operator of the park has filed papers calling me a liar. His lawyers have threatened to sue me personally for \$2 million, a patent absurdity against someone who has spent his entire career in the City service. On the one hand, threats have been made to me that demonstrations will be held to embarrass the Mayor and the City administration and on the other, I have been cajoled to agree voluntarily to permit the continuance of the amusement park operation for “just one more season” on the grounds that they will tie it up in the courts for that long in any case. The entire record would appear to demonstrate a thwarting and frustration of a public purpose by the most flagrant abuse of the judicial process.

6. The attached chronological list of events within the Industrial Park relating to the Adventurer's site is referred to in order to show the history of this matter.

Therefore, the Temporary Restraining Order should be vacated and possession be returned to the City.

(Sworn to by Richard K. Bernstein, May 4, 1976.)

**Chronology of the History of the College Point Industrial Park & The Adventurer's Amusement Site, Annexed to Affidavit of Richard Bernstein.**

- a) *Fall, 1967*—The City Planning Commission designates the College Point Industrial Park area as appropriate for urban renewal.
- b) *Spring, 1969*—The New York City Board of Estimate approves the first phase of the Industrial Development Plan for College Point.
- c) *Summer, 1970*—The operators of Adventurer's "kiddy park" (including the Petitioner before the Court in the instant action) discuss possible expansion of their operation with the Public Development Corporation. They are advised that such use is contrary to the approved plan.
- d) *Spring, 1971*—The City Department of Real Estate, at the request of Adventurer's, and with the approval of PDC so as to avoid traffic congestion, issues a 30-day permit to Adventurer's for "customer no-charge parking."
- e) *Summer, 1971*—Adventurer's submits to PDC a "proposal" for expansion on site for a large amusement park. The "proposal" is reviewed and rejected by the PDC Board of Directors and City's LED Committee. PDC gives a two year commitment to the Queens Borough President that Adventurer's may continue for the summer of 1972 and 1973 in order to phase out their operation.
- f) *Fall, 1971*—The NYC Board of Estimate adopts the second phase Plan for the College Point Industrial Park.
- g) *January, 1972*—Board of Estimate authorizes condemnation of the second phase of the College Point Industrial Park, including all of the Adventurer's site.



*Chronology of the History of the College Point Industrial Park & The Adventurer's Amusement Site, Annexed to Affidavit of Richard Bernstein*

- h) *Summer, 1972*—PDC enters into contract for placing upwards of 3,000,000 cubic yards of fill within the confines of the Industrial Park.
- i) *December, 1972*—City condemns bulk of second phase area including City in-rem area adjacent to Adventurer's fee site.
- j) *Summer, 1973*—City commences action to evict junk yards within the Industrial Park.
- k) *Spring 1974*—condemnation order entered for Adventurer's fee site.
- l) *Summer, 1974*—Court action instituted by Corporation Counsel to evict entire amusement operation in order to continue fill program and improve drainage system.
- m) *Fall, 1974*—Various hearings held in Supreme Court, on City's application for Writs of Assistance.
- n) *March 10, 1975*—Stipulation entered into by the parties and Order on Stipulation signed by Justice Castaldi, Supreme Court, County of Queens, wherein Adventurer's agreed to vacate parking area (with rides) on former City in-rem property, west of the drainage ditch, by *May 5, 1975* and to cease entire operation and vacate site, including former fee land, no later than *November 1, 1975*.
- o) *Fall, 1975*—Various Orders to Show Cause with Stays secured by Adventurer's delaying enforcement of Supreme Court Order of March 10, 1975.

*Chronology of the History of the College Point Industrial  
Affidavit of Richard Bernstein  
Park & The Adventurer's Amusement Site, Annexed to*

- p) *October and November, 1975*—Supreme Court Orders granting final Stay of Order of Possession until November 25, 1975. Order to Show Cause with Stay and Appeal from Supreme Court Order filed with the Appellate Division.
- q) *February, 1976*—Unanimous decision of Appellate Division denying Adventurer's appeal.
- r) *March, 1976*—Application by Adventurer's to Court of Appeals for Stay pending Leave to Appeal from Decision of Supreme Court.
- s) *April 27, 1976*—Court of Appeals Decision dismissing Adventurer's Appeal and dismissing Stay.
- t) *April 29, 1976*—Sheriff of City of New York executes Supreme Court Order and tends possession of all of Adventurer's Amusement Park property, all of which is City-owned, to the City Department of Real Estate.
- u) *April 30, 1976*—Eastern District Court Temporary Restraining Order granted.

**Reply Affidavit of Harold Glantz in Support of  
Plaintiffs' Motion.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,  
County of New York, ss:

HAROLD GLANTZ, being duly sworn, deposes and says:

1. I make this affidavit to supplement my affidavit dated April 29, 1976 in support of the application by plaintiffs for a preliminary injunction in this matter.

2. In the answering papers submitted on behalf of defendants in this matter, there is repeated reference to the urgent and immediate need of the Public Development Corporation ("PDC") for possession of the premises in order to complete a fill program. (See Affidavit of Leonard A. Olarsch, page 8, paras. 23 & 24; Affidavit of Richard K. Bernstein, page 2, para. 3). All of these references are false. They are designed to mislead and deceive this Court.

3. The Olarsch affidavit states categorically that "there is an ongoing contract between the City, PDC and Earth Bank Co., Inc. to fill the area \* \* \* [and] this work has so far progressed that plaintiffs' parcels are next to be filled." The Bernstein affidavit categorically states that "we have stretched out our fill contract to its very limits \* \* \* we have an ongoing contract, and the funds to carry it out \* \* \* [and] if we are again thwarted in obtaining possession of the area for the purpose of placing fill the further development of the industrial park \* \* \* will be seriously compromised."



*Reply Affidavit of Harold Glantz in Support of  
Plaintiffs' Motion*

4. The fact is there is no ongoing fill contract. Mr. DiDonato, one of the principals of Earth Bank Co., Inc., has advised me that Earth Bank has commenced a lawsuit against PDC for non-payment of more than \$150,000 due and owing to Earth Bank from PDC. Furthermore, the remaining fill covered by the contract was entirely designated for premises occupied by Golf City. There is no other fill contract with Earth Bank or any other party; and Earth Bank has now commenced a fill job in Croton, New York, and is unavailable to return to College Point for further fill work.

5. An amended complaint has been served in this matter alleging that, at the instance of PDC, other agencies of the City are engaging in a concerted effort to drive plaintiffs out of business; and that these agencies are applying the law to plaintiffs in an unequal manner. In factual support of those allegations, I annex to this affidavit the following documents:

(a) Copy of letter dated April 27, 1976 from Ira Duchan, Commissioner of the Department of Real Estate, to H. Irving Sigman, Superintendent of the Department of Buildings in the Borough of Queens. That letter states explicitly that Mr. Duchan is acting "at the request of the PDC." On the basis of that letter and oral communication from representatives of PDC, Mr. Sigman refused to renew the permit for place of assembly use which had been routinely renewed year after year. The correspondence from Mr. Sigman dated April 29, 1976 is annexed hereto. It should be noted that the circumstances with respect to occupancy of the premises had not changed in any respect from August 1, 1973 to the present; and that the permits for place of assembly use had been routinely renewed in every year since;

*Reply Affidavit of Harold Glantz in Support of  
Plaintiffs' Motion*

(b) The complaint and my affidavit dated April 29, 1976, refer to a false and malicious complaint to the Buildings Department and the Department of Health made by Richard K. Bernstein. I annex a copy of a report of complaint by the Housing and Development Administration dated April 8, 1976, referring to Richard Bernstein as "Complainant" and a copy of inspection report of the Bureau of Sanitary Engineering of the Department of Health dated April 12, 1976, resulting from an identical complaint;

(c) I attach letter dated May 4, 1976, from the Department of Real Estate stating that a complaint has been received regarding "selling food in the amusement area." In fact, none of the plaintiffs are selling food in the amusement area. I am informed and believe that the false complaint regarding this matter was made by Mr. Bernstein or another representative of PDC.

6. In my April 29th affidavit I refer to the April 21st letter from Lloyd Deutsch of the Department of Relocation. I also stated that defendants are engaged in an effort to put plaintiffs out of business without regard to their actual need for the premises. My counsel, Mr. Squadron, referred in his affidavit to the promises made in open court by various assistants to the Corporation Counsel with respect to relocation benefits. There has now been submitted to another court an affidavit by Mr. Borenstein which confirms these statements.

"24. The Department of Relocation as represented in open Court by your deponent will offer any assistance or expedite any procedures in relation to any claim to which Petitioner is entitled by law to receive and for which proper procedure is followed. However, the continuing of business is

*Reply Affidavit of Harold Glantz in Support of  
Plaintiffs' Motion*

diametrically opposed to the claim for moving and relocation benefits, and the expediting of such claims. As will be discussed later, the spirit of the relocation statutes is to assist tenants who voluntarily vacate \* \* \*

"25. I respectfully point out to the Court that the City, upon taking possession of the premises, is not demanding that Petitioner remove its rides forthwith \* \* \*

"41. Although counsel places great weight on his claim that similarly-situated tenants have been paid benefits, *even if that is true*, that is certainly not conclusive, but merely one piece of evidence to aid in the interpretation of the regulations." (Emphasis added.) (Affidavit of Eugene Borenstein, dated May 6, 1976.)

I respectfully submit that these statements by Mr. Borenstein on behalf of the defendants confirm the intention to deny relocation benefits despite prior promises, the lack of urgent need for the premises since the rides may remain on the premises as long they are not operating, and, most shocking of all, the willingness to interpret the relocation regulations on a selective basis adversely to the plaintiffs.

7. The Olarsch affidavit contains two additional inaccurate and misleading statements.



*Letters, Annexed to Reply Affidavit of Harold Glantz*


(a) In paragraph 3, Mr. Olarsch states that a portion of the premises was occupied by plaintiffs "without permission." In fact, this question has been litigated and plaintiffs have been held by the Supreme Court of the State of New York to have occupied all of the land lawfully as *tenants*;

(b) In paragraph 17, the Olarsch affidavit refers to an advance payment for the former fee-owned land. None of the plaintiffs is entitled to any portion of that advance; and none of them has received the slightest benefit from it.

(Sworn to by Harold Glantz, May 10, 1976.)

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**Letters, Annexed to Reply Affidavit of Harold Glantz.**

(See opposite page.) 



DEPARTMENT OF REAL ESTATE

1 LAFAYETTE STREET, NEW YORK, N. Y. 10007

Telephone No. 566-7530

IRA DUCHAN, Commissioner



April 27, 1976

Distribution

W. Donovan, PA. Sec.  
Chief Insp. Permits  
Chief Insp. Eas. Murph.

PA 5/1/77

Mr. H. Irving Sigman  
Superintendent  
Department of Buildings  
Borough of Queens  
126-06 Queens Boulevard  
Kew Gardens, N. Y. 11415

RE: Adventurer's Amusement Park

Dear Mr. Sigman:

This is to advise you that the Adventurer's Amusement Park is located entirely on City-owned land within the College Point Industrial Park. A portion thereof was formerly owned in fee by the Amusement Park and was condemned in 1974. The remainder of the Amusement Park operation is on former City in-rem property which was condemned by the City to clear title in 1972.

A month-to-month permit was granted by the Department of Real Estate for the Amusement Park operation on a portion of the City in-rem land in 1972. This permit was terminated, effective as of August 1, 1973 and from said date there has been no permit or lease between the City and the Amusement Park operation.

The Board of Standards and Appeals on April 12, 1973 (Application #620-72-BZ) granted a Special Permit within an M1-1 district for "the enlargement in area of an existing Amusement Park on... condition that in the event the City terminates the lease the variance shall lapse..."

At the request of the Public Development Corporation, which is developing the Industrial Park on behalf of the City, we call this information to your attention for appropriate action of the Department of Buildings.

Very truly yours,

IRA DUCHAN  
Commissioner



# HOUSING AND DEVELOPMENT ADMINISTRATION

ROGER STARR, Administrator, (Temp.)

Department of Buildings  
100 GOLD STREET, NEW YORK, N. Y. 10038

JEREMIAH T. WALSH, P.E., Commissioner

P.A. Section  
Phone / 520-3409  
April 29, 1976

**Manhattan**  
MUNICIPAL BUILDING  
NEW YORK, N. Y. 10007

**The Bronx**  
1932 ARTHUR AVENUE  
BRONX, N. Y. 10457

**Brooklyn**  
MUNICIPAL BUILDING  
BROOKLYN, N. Y. 11201

**Queens**  
136-06 QUEENS BLVD.  
Kew Gardens, N. Y. 11415

**Richmond**  
BOROUGH HALL  
ST. GEORGE, N. Y. 10301

ING Enterprises  
dba Adventurers Inn  
28-30/50 Linden Place  
Flushing, N.Y., 11354

Re; P.A. 42/57  
Perm/ 28-30/50 Linden Place

Gentlemen:

We have been informed by the Department of Real Estate that the City of New York, is the owner of the property at 28-30/50 Linden Place, Flushing, New York. As your lease is on a month to month basis, we are under strict orders from them not to issue any new permits for place of assembly use.

For any further information, regarding a deviation from this order, would your please contact the Department of Real Estate, at 2 Lafayette Street, New York, N.Y., 10007.

Very truly yours,

H. Irving Sigmant,boro Supt. Queens

by *H. Irving Sigmant*  
Public Assembly Section

BEST COPY AVAILABLE





HOUSING AND DEVELOPMENT ADMINISTRATION  
ROGER STARR, Administrator, (Temp.)

Department of Buildings  
100 GOLD STREET, NEW YORK, N. Y. 10038

JEREMIAH T. WALSH, P.E., Commissioner

P.E. Section  
Phone 520-3109  
April 29, 1976

Manhattan  
MUNICIPAL BUILDING  
NEW YORK, N. Y. 10007  
The Bronx  
1932 ARTHUR AVENUE  
BRONX, N. Y. 10457  
Brooklyn  
MUNICIPAL BUILDING  
BROOKLYN, N. Y. 11201  
Queens  
126-06 QUEENS BLVD.  
NEW GARDENS, N. Y. 11415  
Richmond  
BOROUGH HALL  
ST. GEORGE, N. Y. 10301

MEG Enterprises  
dia Adventurers Inn  
28-30/50 Linden Place  
Flushing, N.Y., 11354

Re; P.A. 51/57  
28-30/50 Linden Place

Gentlemen:

This Department is returning your check # 1662, dated 4/21/76, in the amount of Twenty seven dollars and fifty cents.

We have been informed by the Department of Real Estate that the City of New York, is the owner of the property at 28-30/50 Linden Place, Flushing, New York. As your lease is on a month to month basis, we are under strict orders from them not to issue any new permits for place of assembly use.

For any further information, regarding a deviation from this order, would you please contact the Department of Real Estate, at 2 Lafayette St., New York, New York, 10007.


Very truly yours,

H. Irving Sigmund, Boro Supt., Queens

by *[Signature]*

N.D.  
Check enclosed

**Complaint and Report of Inspection, Annexed to Reply  
Affidavit of Harold Glantz.**

(See opposite page.) 

The City of New York

HOUSING AND DEVELOPMENT ADMINISTRATION

Department of Buildings

COMPLAINT

Location <u>Living Place - 1st Avenue 2nd Floor</u>		Complaint No. <u>1217</u>
Date <u>1/18/76</u>	Borough <u>1</u>	
Nature of Complaint <u>Unsafe and unsafe structures - Over-occupied to unsafe conditions in residential building</u>		
Complainant <u>Richard B. ...</u>	Address <u>566-3050</u>	
Received by <u>T</u>	Time Rec'd <u>1</u>	Referred to <u>ELC</u>
Emergency action taken _____		
Owner's Name _____ Address _____		
INSPECTOR'S REPORT ON THE ABOVE COMPLAINT		
To the Borough Superintendent:		
I have investigated the above complaint on _____, 19____ and report as follows: _____		
_____		
_____		
_____		
Inspector _____ Title _____		



133E 10M 706122 1721

## REPORT OF INSPECTION

The City of New York - Department of Health

BUREAU OF SANITARY ENGINEERING, 93 Worth Street, New York, N. Y., 10013

NOTICE: Sanitarians of the Department of Health are provided with badges. They also have identification cards which contain their photograph and signature, the seal and signature of the Personnel Director of this Department. They are required to show them on request.

ADDRESS OF PREMISES <i>2850 Linden Place, Queens</i>	BORO <i>Queens</i>	CHARACTER OF PREMISES <i>Amusement Park</i>
NAME <i>The Post-Advertiser</i>	CODE NUMBER	DATE <i>4-12-76</i>

I inspected the above establishment and notified *Mr. Harold Glantz, Purser* of the following:

*Interim Mr. H. Glantz inspected*

*premises.*  
**GEORGE SCHAIBLE, CHIEF** 566-6015 or  
566-6020

PENALTY FOR FALSIFICATION: Falsification of any statement made herein is an offense punishable by a fine or imprisonment or both N.Y.C. Adm. Code Sec. 1151.9.0

RECEIVED COPY <i>H. Glantz</i>	PUBLIC HEALTH SANITARIAN <i>37</i>	BADGE NO. <i>724/1003</i>	REPORT SUB
APP. <i>H. Glantz</i>	SURV. <i>E.C.</i>	CHEMICAL SAMPLE TAKEN <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	BACTERIA SAMPLE TAKEN <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
DIVISION	POLLUTION CON.	SEW. DISP.	GENERAL ENGINEERING
TEL. NOS.	566-6015	566-6020	566-6020
			WATER CONT.

E.A.A. 6014



DEPARTMENT OF REAL ESTATE  
2 LAFAYETTE STREET, NEW YORK, N. Y. 10007

IRA DUCHAN, Commissioner

In reply refer to:  
R. Pratangelo  
Tel: 556-1714



May 4, 1976

M. E. G. Enterprises  
28-50 Linden Place  
Flushing, N. Y.

Re: Block 1334 - Lot 10(pt)  
28-50 Linden Place  
Flushing, N. Y.

Dear Mr. Glantz:

We have been informed you are selling food in the amusement area which is against your oral and written agreement. This practice must stop immediately. Failure to comply will result in substantial rent increases and eviction from said property for violating the lease agreement.

Very truly yours,

Milton C. Master  
Milton C. Master, Director  
Bureau of Property Management

URGENT MAIL - RETURN RECEIPT REQUESTED





**Reply Affidavit of Gerald Goldstein in Support of  
Plaintiffs' Motion.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,  
County of New York, ss:

GERALD GOLDSTEIN, being duly sworn, deposes and says:

1. I am an attorney-at-law admitted to practice in the State of New York with offices located at 32 Broadway, New York City. In lieu of subpoena I make this affidavit in support of the application by plaintiffs for a preliminary injunction in this matter.

2. I represent Underhill Construction Corporation, a company with principal offices now located in Hicksville, Long Island. Prior to December 1974, the company occupied premises at College Point Causeway & 125th Street in Queens, New York, in an area that is part of the proposed College Point Industrial Park. The premises were owned by the City of New York and were occupied by my client on a month-to-month lease.

3. The premises occupied by my client were included in a condemnation order dated December 1, 1972. Writ of assistance proceedings were commenced by the New York City Public Development Corporation on behalf of the City of New York in June of 1973. An Order of Possession was granted by Justice Castaldi in December of 1973. However, possession of the premises was not actually surrendered until December 1974. I am informed by my client who made application personally for relocation benefits, that the City paid to my client approximately \$25,000.00 to cover relocation expenses at the time the premises were surrendered.

4. My client's claim for compensation for fixtures located on the premises is still pending.

(Sworn to by Gerald Goldstein, May 11, 1976.)

**Reply Affidavit of Kenneth Reiss in Support of  
Plaintiffs' Motion.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,  
County of Bronx,      ss:

KENNETH REISS, being duly sworn, deposes and says:

1. I am an attorney at law admitted to practice in the State of New York with offices located at 43 Westchester Square, Bronx, New York. I make this affidavit in support of the motion by plaintiffs for a preliminary injunction in this matter.

2. I am thoroughly familiar with the College Point Industrial Park area and the efforts of the Public Development Corporation to dispossess condemnees in possession. I represent a number of those condemnees. In at least two cases involving clients of mine who were tenants of the City of New York on a month-to-month basis at the time of condemnation, the costs of relocation were paid by the City in exchange for the surrender of possession.

3. During 1974, the Public Development Corporation sought to dispossess one of my clients, Town & Country Auto Parts, at 31-15 College Point Causeway, College Point, New York. Town & Country had been a tenant of the City on a month-to-month basis prior to condemnation of the premises. After lengthy negotiations, which I conducted, Town & Country surrendered possession of the premises and was paid \$118,000 for relocation costs.

4. During the summer of 1975, the Public Development Corporation sought possession of premises occupied by

*Reply Affidavit of Kenneth Reiss in Support of  
Plaintiffs' Motion*

my client, Preveta Bros., at 125-06 31st Avenue, College Point, New York. Preveta occupied its premises prior to condemnation as a tenant of the City on a month-to-month basis. This client, like Town & Country, conducted an auto wrecking business at its premises but did not have as many vehicles on hand at the time. Accordingly, Preveta received \$14,000 in relocation costs in exchange for surrender of possession.

5. In both of the foregoing cases, the Public Development Corporation made representations concerning the development activity on the premises. In fact, to my own personal knowledge, there has been no development activity in the area previously occupied by my clients, or in any place else in the College Point Industrial Park area, since the condemnation. The Western Electric building, which is frequently mentioned by the Public Development Corporation representatives, was built seven or eight years ago before the condemnation. The building at the other end of the premises was built for the New York World's Fair. No other buildings have been erected on the premises and all the areas which are marked "current development" on the maps of the Public Development Corporation are, in fact, not being developed.

(Sworn to by Kenneth Reiss, May 11, 1976.)



**Reply Affidavit of Allan Bunshaft in Support of  
Plaintiffs' Motion.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,  
County of New York, ss:

ALLAN BUNSHAFT, being duly sworn, deposes and says:

1. I am a certified public accountant with an office located at 793 Lexington Avenue, New York, New York. I make this affidavit in support of the application by plaintiffs for a preliminary injunction in this matter.

2. I have known Harold Glantz, one of the principals of MHG Enterprises, Inc., for approximately five years, and have been associated with him from time to time in business activities. Approximately two weeks ago I was visiting Mr. Glantz at his office and he showed me a letter dated April 21, 1976 from the Housing and Development Administration of the City of New York signed by Deputy Commissioner Lloyd A. Deutsch, denying an application for relocation benefits made by K. J. Amusements, Inc. I told Mr. Glantz that I knew a Lloyd Deutsch, who was an attorney for the City of New York, for more than 10 years, but I had not been in touch with him recently and I was not sure that he was the same man who was Deputy Commissioner. I volunteered to call Mr. Deutsch and, if he was the same person I knew, to talk to him about the matter.

3. I called Mr. Deutsch and discovered he was the man I knew for many years. I made a lunch date with him for Friday, April 30th. At that lunch, I told him I was a business associate of Harold Glantz and asked him why

*Reply Affidavit of Allan Bunshaft in Support of  
Plaintiffs' Motion*

the relocation benefits were being denied to the amusement ride owners at the amusement park being run by MHG Enterprises, Inc. I asked Mr. Deutsch whether Mr. Glantz was right in saying that other condemnees in the area had received relocation benefits. He replied that other persons did receive relocation benefits but the amounts were nominal and they were poor. He pointed out that the relocation costs of moving the amusement rides might exceed a million dollars and the City could not afford such an expense.

4. I asked Mr. Deutsch whether there was any possibility of permitting the amusement park to operate until after Labor Day. Mr. Deutsch said that he would make arrangements to permit such operation until October 1st or October 15th, if the plaintiffs in this matter would waive relocation expenses. He said further that his department would find another location of similar size where the amusement rides could be relocated, at the expense of their owners, if the relocation claim was waived. He specifically spoke of a lease up to five years for such new location.

(Sworn to by Allan Bunshaft, May 11, 1976.)

**Reply Affidavit of Ralph St. John in Support of  
Plaintiffs' Motion.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,  
County of Queens,      ss:

RALPH ST. JOHN, being duly sworn, deposes and says:

I am the President of Butkewich Trucking Corp., located at 127-36 Northern Boulevard, Flushing, New York 11368.

I am submitting this sworn statement in support of the plaintiff's application for a temporary restraining order and preliminary injunction, and also in edification of the court's knowledge in connection with the customs and practices of the New York City Public Development Corporation (PDC).

That prior to December, 1972, I was the owner of property at 125-16 31st Avenue, College Point, Queens, New York, which was located within the College Point Industrial Park.

That my property was condemned in December, 1972, at which time I was ordered by the court to move from my property and as a result of the condemnation I was finally forced off my land in July, 1975, under the peril over my head that I would be possibly fined \$1,000.00 a day if I did not vacate the property.

That at the time I was ordered to remove my business from my property, PDC was telling the court that PDC had a present and urgent need for this property and I had to vacate this property immediately because I was holding back progress.

That I felt that when PDC told the court that the land had immediate use for a prospective new tenant, that



*Reply Affidavit of Ralph St. John in Support of  
Plaintiffs' Motion*

this might not be the real fact, but I was unable to counter PDC because of their power in condemnation. I vacated the property after an extensive fight, to my detriment and as later described, my considerable subsequent damages.

That effective today, May 10, 1976, and during the entire period since my property was condemned, there has never been any tenant upon the property I was forced to vacate, nor to the best of my knowledge, had there ever been a prospective tenant ready to take the property I was forced to vacate, and in fact, PDC had made arguments to the court that the property had to be taken in order that it be filled properly and in fact, until today, the entire property has never been completely filled.

That I made an application for my relocation expenses and gave them actual estimates of approximately \$51,000.00 from bona fide movers, which the City rejected and refused to pay. After extensive negotiations and harassment by the City of New York, and after I became aware that unless I moved within thirty (30) days, I would be subject to \$1,000.00 a day fine, I agreed to move myself for a price less than half of what my original estimates were from third parties.

That in summary of the aforesaid, the court must be made aware of the following details again: My property was condemned with the allegations to the court that it was needed immediately by PDC, when in fact it has never been used by PDC for any of the purposes they outlined to the court; I was forced to take less than half the estimates of my relocation costs, and by reason of the harassment and continued badgering by PDC, I was caused to lose untold thousand of dollars in business and continuity and growth of my business was hampered and interrupted.

(Sworn to by Ralph St. John, May 10, 1976.)

**Sur-Reply Affidavit of Richard K. Bernstein in Opposition to Plaintiffs' Motion and in Support of Defendants' Cross-Motion.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,  
County of New York, ss:

RICHARD K. BERNSTEIN, being duly sworn, deposes and says that as Executive Director of the New York City Public Development Corporation (PDC), I am fully familiar with the matter before this Court. This affidavit is made in opposition to the application of MHG Enterprises, Inc., *et al.*, and in answer to misleading statements made in the affidavit submitted by Harold Glantz, sworn to May 10, 1976.

1. With regard to the on-going contract between PDC and the Earth Bank Company, Inc., which Mr. Glantz stated, "there is no on-going fill contract," the fact is that the contract is still in existence and as of this date, May 12, 1976, and we are ready, willing and able to place the fill required on the Adventurer's site. In this respect, it should be noted that we have been waiting for possession of the site since May 5, 1975, more than a year ago, pursuant to the stipulation entered into by Mr. Glantz, in the Supreme Court, County of Queens, and the need for the site, in order to stabilize the drainage conditions essential for the Industrial Park and required for the development of the area, have now become even more critical.

2. With respect to Mr. Glantz' statements in paragraph 5 of his affidavit, PDC, pursuant to direction of The City, as set forth in various Board of Estimate



*Sur-Reply Affidavit of Richard K. Bernstein in Opposition to Plaintiffs' Motion and in Support of Defendants' Cross-Motion*

Resolutions, has the responsibility for the development and management of the College Point Industrial Park. In carrying out this responsibility it is the obligation of PDC to uphold the laws and ordinances relating to this area and to effectuate remedial action where there may be violations occurring.

a. It should be noted, as set forth in Exhibit 1 attached hereto, the Board of Standards and Appeals, by decision dated April 12, 1973, granted a special permit to MHG Enterprises for, "enlargement in area of an existing amusement park *on condition* that all work shall substantially conform to drawings filed \* \* \* and *on further condition that in the event the City terminates the lease the variance shall lapse* and that all laws, rules and regulations applicable be complied with and that substantial construction be completed within one year from the date of this resolution." (emphasis added).

b. On August 1, 1973, the Department of Real Estate sent a 30-day Notice to MHG Enterprises terminating their tenancy (Exhibit 2) and on April 1, 1974, the Department of Real Estate sent another 30-day Notice terminating the tenancy of MHG Enterprises (Exhibit 3). Therefore, it is obvious that in addition to the many legal actions, stays, orders and decisions that have transpired in the State Court, through and including the Court of Appeals, there has been a substantial change in the "tenancy" of MHG Enterprises in that the variance obtained from the Board of Standards and Appeals terminated when their lease was terminated in August, 1973.

c. With respect to complaints made to the Department of Buildings, the Department of Health, etc., it should be noted that MHG Enterprises is operating an amusement park, including facilities for animals and, on in-



*Sur-Reply Affidavit of Richard K. Bernstein in Opposition to Plaintiffs' Motion and in Support of Defendants' Cross-Motion*

formation and belief, trailers in which employees and/or its licensees live during the season, all on City-owned land.

There is a serious question as to whether the building and sanitary codes are being followed and it is obviously the obligation of The City to enforce these codes, especially on City-owned land.

d. On information and belief, based upon telephone complaints received in the office of PDC from the operators of the restaurant on the site, MHG Enterprises, contrary to its agreement with the Department of Real Estate and with the operators of the restaurant, have been permitting the sale of food in the amusement park area. While it may be true that, "none of the complainants have been selling food in the amusement area," it is obvious that someone is selling food there.

3. In conclusion, as stated in my affidavit of May 4, 1976 the need to possess this site is critical and the attempts to operate it by Glantz for "just one more season" will be detrimental to the development of the Industrial Park.

Therefore, the Temporary Restraining Order should be vacated and possession of this site returned to the City of New York forthwith.

(Sworn to by Richard K. Bernstein, May 12, 1976.)

Issued under authority of Chapter 27, Section 645 of the Charter of the City of New York  
Published weekly by the Board of Standards and Appeals at its office, 30 Lafayette Street, 9th Floor, New York  
New York, N. Y. 10013

Vol. LVIII      Subscription      April 12, 1973      By ☐ 66 cents (U.S. only)      ☐ 15  
\$25.00 a year      Single Copies      \$1.00 each

**BOARD OF STANDARDS AND APPEALS**

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**PHILIP P. AGUSTA, Vice Chairman**  
**HOWARD B. HORNSTEIN**  
**JEREMIAH T. WALSH**  
**HARRY M. CARROLL**

Continued on p. 10

JOHN B. CINCOSTA, Executive Director  
 JOHN HARRIS, Atwell, Deputy Director  
 JAMES R. MULROY, Secretary

AVRIL H. LATNAM, Chief Clerk

Office - 49 Lafayette Street, 9th Floor, New York, N.Y. 10013.

TELEPHONE - 564-5174.

NOTES

The Board of Directors of the National Association of Manufacturers has announced that it will support the proposed legislation to establish a National Bureau of Standards and Technology. The board believes that such a bureau is essential to the development of a strong and efficient national system of standards and measurements.

## CONTENTS

**Director.**

## Notice of Floating of Calendar

Minutes of Regular Meeting, Trustee Meeting, April 3, 1973, Attached Calendar

[illegible]

1972

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3-10-BBY	50-70	70-75
4-10-BBY	50-70	70-75
5-10-BBY	50-70	70-75
6-10-BBY	50-70	70-75
7-10-BBY	50-70	70-75



# EXHIBIT 1, ANNEXED TO SUR-REPLY AFFIDAVIT OF RICHARD K. BERNSTEIN MINUTES

less than the required lot area, the erection of a two-family dwelling that exceeds the permitted floor area ratio, has less than the required open space ratio and lot area per room and encroaches on the required front and side yards.

**PREMISES AFFECTED**—9223 Avenue J and 1250 East 93rd Street, northwest corner, Block 8200, Lot 1, Borough of Brooklyn, Community Board #17

## APPEARANCES—

For Applicant: Harriet R. Jacobs.  
For Opposition: Sal Callesano and Anthony Pagano.

**ACTION OF BOARD**—Laid over to May 1, 1973, at 10 A.M., for continued hearing; previously inspected.

## 72-72-BZ

**APPLICANT**—Ingram S. Carner for DeLong Realty Corporation, owner.

**SUBJECT**—Application November 14, 1972—decision of the Borough Superintendent, under Section 11-412 of the Zoning Resolution, to permit in an R6 district, at an existing medical and professional establishment previously before the Board, the enlargement in area of the accessory parking.

**PREMISES AFFECTED**—133-42 41st Avenue, south side, 107.13 feet west of Main Street, Block 5041, Lots 18, 21, Flushing, Borough of Queens, Community Board #7.

## APPEARANCES—

For Applicant: Ingram S. Carner.  
For Opposition: None.

**ACTION OF BOARD**—Laid over to May 8, 1973, at 10 A.M., for hearing; applicant to correct application and submit required information.

## 74-72-BZ

**APPLICANT**—Lana & Vassalotti for Utopia Associates, owner.

**SUBJECT**—Application November 21, 1972—decision of the Borough Superintendent, under Section 73-211 of the Zoning Resolution, to permit in a C2-2 district, the erection and maintenance of a automotive service station with accessory uses.

**PREMISES AFFECTED**—181-08 Horace Harding Expressway and 28-05 Utton Parkway, Southeast corner, Block 7000, Lot 2, Flushing, Borough of Queens, Community Board #8.

## APPEARANCES—

For Applicant: James E. Vassalotti.  
For Opposition: None.

**ACTION OF BOARD**—Laid over to May 8, 1973, at 10 A.M. At the request of Community Board #8.

## 76-72-BZ

**APPLICANT**—Frederick A. Kauter for Humble Oil & Refining Company, owner; The Car Stack, Incorporated, lessee.

**SUBJECT**—Application December 4, 1972—decision of the Borough Superintendent, under Section 11-412 of the Zoning Resolution, to permit in an R6 district, the change in use of an automotive service station with accessory uses, previously before the Board, to an open automobile sales and display with accessory repairs and paint spraying.

**PREMISES AFFECTED**—236-042 52nd Avenue, north east corner of Linden Boulevard, Block 2630, Lot 1, Borough of Brooklyn.

## APPEARANCES—

For Applicant: Frederick Kauter, Vello Krasna and Stanley Fromberg.

For Opposition: Carl E. Seale, Charles Spaulding, Patricia Lights, Gladys Stephens, Laurence and Alice Whitney and Mary Bracey.  
For Administration: Diane Stutman, Housing and Development Administration.

**ACTION OF BOARD**—Laid over to April 25, 1973, at 10 A.M., for decision; previously inspected; hearing closed.

## 72-73-BZ

**APPLICANT**—Abram Shleifstein and Mario Matthew Cuomo for Jean Frischling, Stanley Frischling as Executors of estate of Murry Frischling, owners.

**SUBJECT**—Application January 26, 1973—decision of the Borough Superintendent, under Sections 73-211 and 73-212 of the Zoning Resolution, to permit in a C6-1 district, the erection and maintenance of an automotive service station with accessory uses.

**PREMISES AFFECTED**—41-57 Third Avenue, 520-528 Atlantic Avenue, southeast corner, 501-509 Pacific Street, Block 186, Lot 1, Borough of Brooklyn.

## APPEARANCES—

For Applicant: Abram Shleifstein.  
For Opposition: John R. Urban, Martha S. Rush, Rik Pierce, Benjamin A. Marvin, Robert E. Higginbotham, Harry G. Reid and Mark Zulli.

**ACTION OF BOARD**—Laid over to April 25, 1973, at 10 A.M., for continued hearing; previously inspected. Laid over at request of objectors.

## 620-72-BZ

**APPLICANT**—Anthony M. Salvati for City of New York, owner; M. H. G. Enterprises, Incorporated, lessee.

**SUBJECT**—Application September 27, 1972—decision of the Borough Superintendent, under Sections 73-26 and 73-03 (g) of the Zoning Resolution, to permit in an M1-1 district, the enlargement in area of an existing amusement park.

**PREMISES AFFECTED**—28-50 Linden Place, northwest corner of Whitestone Expressway, Blocks 4331, 4332, 4334, Lots 1, 6, 62, 10, Flushing, Borough of Queens, Community Board #7.

## APPEARANCES—

For Applicant: Harriet R. Jacobs.  
For Opposition: None.

**ACTION OF BOARD**—Application granted on condition.

## THE VOTE—

Affirmative: Chairman Klein, Vice Chairman Agosta, Commissioner Hornstein, Commissioner Walsh and Commissioner Carroll ..... 5  
Negative: ..... 0

## THE RESOLUTION—

WHEREAS, a public hearing was held on this application on March 13, 1973, after due notice of publication in the Bulletin; laid over to March 27, 1973; and to April 3, 1973; and

WHEREAS, the decision of the Borough Superintendent, dated September 8, 1972, acting on App. 919/1972, reads:

"1. Proposed Amusement Park Use Group 15, in an M1-1 district is contrary to Sec. 23-22."

and

WHEREAS, the premises and surrounding area were inspected by a committee of the Board;

WHEREAS, the Board has determined that the evidence in the record supports the findings required to be made under Section 73-26 and 73-03 (g) of the Zoning Resolution.



# EXHIBIT 1, ANNEXED TO SUR-REPLY AFFIDAVIT OF RICHARD K. BERNSTEIN

## MINUTES

Resolved, that the Board of Standards and Appeals hereby make the required findings and grant a Special Permit under Section 23-26 and 23-03(g) of the Zoning Resolution, to permit in an M1-1 district, the enlargement of area of an existing amusement park on condition that all work shall substantially conform to drawing filed with this application marked "Received September 27, 1972," 2 sheets; "February 8, 1973," 2 sheets and "March 22, 1973," 1 sheet; and on further condition that in the event the City terminates the lease the variance shall lapse and that all laws, rules and regulations applicable be complied with and that substantial construction be completed within one year from the date of this resolution.

### 716-72-BZ

**APPLICANT**—Leonard F. Rothkrug for Trelaff Corporation, owner; Parkway Cab Company, lessee.

**SUBJECT**—Application November 3, 1972—decision of the Borough Superintendent, under Section 72-21 of the Zoning Resolution, to permit in a C2-2 district, the erection of a two story commercial building that exceeds the permitted floor area ratio and to be occupied as motor vehicle repair shop, garage, stores and offices.

**PREMISES AFFECTED**—3500 East Tremont Avenue, northwest corner of Lafayette Avenue, Block 5531, Lot 113, Borough of The Bronx, Community Board #10.

### APPEARANCES—

For Applicant: Leonard F. Rothkrug.  
For Opposition: Edward J. Dunn, Community Board #10, I. Deppaert, Michael Malwew, George Sierpinsky, C. Lukacina, John Zenir and others.

**ACTION OF BOARD**—Application withdrawn at the request of the applicant.

### THE VOTE—

Affirmative: Chairman Klein, Vice Chairman Agusta, Commissioner Hornstein, Commissioner Walsh and Commissioner Carroll ..... 5  
Negative: ..... 0

### 637-72-BZ

**APPLICANT**—Weinberg and Kirshenbaum for Max Torn, owner.

**SUBJECT**—Application October 5, 1972—decision of the Borough Superintendent, under Section 72-21 of the Zoning Resolution, to permit in a C6-2 district, in an existing three story building, the change in occupancy from store and two family dwelling to textile manufacturing.

**PREMISES AFFECTED**—46 Hester Street, south side, 627½ feet east of Ludlow Street, Block 297, Lot 15, Borough of Manhattan.

### APPEARANCES—

For Applicant: Harold Weinberg and Hersch Reisman.  
For Opposition: None.

**ACTION OF BOARD**—Application granted on condition.

### THE VOTE—

Affirmative: Chairman Klein, Vice Chairman Agusta, Commissioner Hornstein, Commissioner Walsh and Commissioner Carroll ..... 5  
Negative: ..... 0

### THE RESOLUTION—

WHEREAS, a public hearing was held on this application on March 20, 1973, after due notice by publication in the Bulletin; and was laid over to April 3, 1973, and

WHEREAS, the decision of the Borough Superintendent, dated September 18, 1972, acting on Alt. Applie. 1124/71, reads

"C3—Textile Manufacturing, C.G. 17, is not permitted as of right in a C6-2 zoning district, Z.R. 4-14"

and

WHEREAS, the premises and surrounding area were inspected by a committee of the Board; and

WHEREAS, the Board has determined that the change in the record supports the findings required to be made under Section 72-21 of the Zoning Resolution; and that the applicant is therefore entitled to relief on the grounds of unusual difficulty and/or unnecessary hardship;

Resolved, that the Board of Standards and Appeals hereby make each and every one of the required findings and grants a variation in the application of the Zoning Resolution, and that the application be and that a permit is granted under Section 72-21 of the Zoning Resolution, to permit in a C6-2 district, in an existing three-story building, the change in occupancy from store and two-family dwelling to textile manufacturing on condition that all work shall substantially conform to the drawings filed with this application marked "Received October 3, 1972," 5 sheets and "March 27, 1973," 4 sheets and that all laws, rules and regulations applicable be complied with and that substantial construction be completed within one year from the date of this resolution.

### 638-72-A

**APPLICANT**—Weinberg and Kirshenbaum for Max Torn, owner.

**SUBJECT**—Application October 5, 1972—decision of the Borough Superintendent re: live load use of Class 4 frame building for manufacturing purpose.

**PREMISES AFFECTED**—46 Hester Street, south side, 627½ feet east of Ludlow Street, Block 297, Lot 15, Borough of Manhattan.

### APPEARANCES—

For Applicant: Harold Weinberg and Hersch Reisman.

**ACTION OF BOARD**—Appeal granted on condition.

### THE VOTE—

Affirmative: Chairman Klein, Vice Chairman Agusta, Commissioner Hornstein, Commissioner Walsh and Commissioner Carroll ..... 5  
Negative: ..... 0

### THE RESOLUTION—

WHEREAS, the decision of the Borough Superintendent, dated September 13, 1972, on Alt. Applie. 1124/71, reads:

"C-11 Live load of 100 lbs. per sq. ft. is required for manufacturing C26-30."

C-12 The use of a Class 4 wood frame 3-story building for manufacturing is contrary to C26-30.

and

WHEREAS, the premises were inspected by a committee of the Board which recommended that the appeal be granted under certain conditions;

Resolved, that the action and decision of the Borough Superintendent, dated September 13, 1972, on Alt. Applie. 1124/71, be modified and that the same be now hereby granted on condition that the floors be reinforced to provide a live load of 100 lbs. per square foot and conform to the resolution of the Board on this date on Cal. #637-72-A; and all other laws, rules and regulations applicable be complied with.

### 618-72-BZ

**APPLICANT**—McGee and Morselling for Richard Corbierno, owner.

EXHIBIT 2, ANNEXED TO SUR-REPLY AFFIDAVIT OF  
RICHARD K. BERNSTEIN

EXHIBIT 2

Notice to Monthly Tenant.

August 1,

1973

N.H.G. Enterprises, Inc. - Martin Garin, Pres.

To: 20-50 Linden Place, Flushing, N.Y. 11354 - Approx. 234,000 sq. ft.

Tenant of Premises: Improved Area, E/O of Linden Place, N/O  
Whitestone Expressway, College Point, N.Y.  
Parts of Blocks: 4361- Lots 1, 31-78, 4362, Lots 6, 36, 44, 62.  
4364- Lots- 71, 75, 4304 Pt. 43 3 ft. 4334- Lot 50

You are hereby notified that the Landlord elects to terminate your tenancy of the premises above described now held by you under monthly hiring; and that unless you remove from the said premises on the 31st day of August 1973, the day on which your term expires, the Landlord will commence summary proceedings under the Statute to remove you from said premises for the holding over after the expiration of your term.

City of New York  
Department of Real Estate  
2 Lafayette Street  
New York, N.Y. 10007

Landlord

Milton C. Master

Milton C. Master, Director of  
Bureau of Property Management  
and Maintenance

EXHIBIT 3, ANNEXED TO SUR-REPLY AFFIDAVIT OF  
RICHARD K. BERNSTEIN

EXHIBIT 3

M.O. - Thirty Days Notice to Monthly Tenant.

April 1,

M. H. G. Enterprises, Inc. - Martin Garin, Pres.  
To 28-50 Linden Place, Flushing, N. Y. 11354 - Approx. 224,000 sq. ft.

Tenant of Premises: Unimproved Area - 2/3 of Linden Place, 2/3 of the

Supermarket, College Point, N. Y.

Parts of Blocks: 4331 - Lots - 1, 21-75, 4332, Lots - 6, 22, 44, & 42.  
- 4304 - Lots - 71, 75 & 303 Pk. 4304 Pk. 4334 - Lot 50.

You are hereby notified that the Landlord elects to terminate your tenancy of the premises above described now held by you under monthly hiring; and that unless you remove from the said premises on the 30th day of April 19 74, the day on which your term expires, the Landlord will commence summary proceedings under the Statute to remove you from said premises for the holding over after the expiration of your term.

City of New York  
Department of Housing  
2 Lafayette Street  
New York, N. Y. 10007

M. H. G. Enterprises, Inc.  
Martin Garin, President  
and Superintendent



**Affidavit of Lloyd A. Deutsch in Opposition to  
Plaintiffs' Motion.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York,  
County of New York, ss:

LLOYD A. DEUTSCH, being duly sworn deposes and says:

I am an attorney at law, presently serving as Deputy General Counsel to the Housing and Development Administration and Counsel to the Department of Relocation and Management Services, a constituent department of said Administration.

This affidavit is made in opposition to the application of plaintiffs for a preliminary injunction and in rebuttal to the affidavit submitted by Allan Bunshaft. This affidavit is made in order to truly set forth my recollection of a conversation with Allan Bunshaft and to fully apprise this court of the facts and circumstances surrounding said conversation.

On or about April 30, 1976, Mr. Bunshaft telephoned and asked to meet me for lunch. I offered to meet with him in my office. Mr. Bunshaft indicated it might be more pleasant to meet at lunch. I agreed. After the usual pleasantries, Mr. Bunshaft asked to speak to me about the problems of MHG Enterprises, Inc., his client. I advised Mr. Bunshaft that the Department of Relocation served as a service agency for other departments, offering relocation services and as fiscal agent for the payment of benefits to residential and commercial tenants of

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the City of New York forced to relocate as a result of governmental action; in this instance, the condemnation of the College Point Industrial Park.

When asked if benefits had been paid to other tenants similarly situated to plaintiff, I advised Mr. Bunshaft that in all probability benefits had been paid; that I had no direct knowledge of those payments and if such payments had been made, they had been made in error. I explained to Mr. Bunshaft that to my knowledge, the only relocatees from the sites who had been relocated were relatively small enterprises and the payments if made were nominal. I made no representation as to the wealth and financial condition of any of our site tenants.

I advised Mr. Bunshaft that monies were available to pay any relocation benefits ordered and said monies were presently budgeted. Concededly, the City's financial crises was discussed and as is obvious to any reader of the Daily Press, the City of New York as an entity, cannot afford to pay benefits or other stipend to any firm or individual when such act is *ultra vires* in nature.

When asked if there was a possibility of permitting the Park to operate until after the Labor Day weekend, I advised Mr. Bunshaft that the Department of Relocation had no objection, but further cautioned him that as a service agency and not the Park's landlord, we did not have authority or discretion to permit such operation and suggested that Mr. Bunshaft's client communicate with the Public Development Corporation, The Economic Development Administration or the Office of the Mayor, and if so directed by our client, no action would be taken on the part of the Department of Relocation to force the dislocation of this amusement park.

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It must be stressed that plaintiffs herein well know that they have been subject to an order of the court delivering possession of the premises to the City of New York for well over a year. The record clearly shows that a preponderance of the property occupied by the plaintiff was either owned by the City of New York prior to its tenancy on a 30 day permit or lease from the City or was "squat" land. Occupying these premises without color of right or on a short term basis does not create on a moral equitable or legal basis, the grounds for the payment of relocation benefits. I submit however, that the Department of Relocation stands ready to pay over to plaintiff such benefits as are properly due and owing.

(Sworn to by Lloyd A. Deutsch, May 12, 1976.)



**Letter of Plaintiffs' Counsel to Judge Costantino, in  
Support of Plaintiffs' Motion.**

SQUADRON, ELLENOFF & PLESANT

551 FIFTH AVENUE

New York, N. Y. 10017

May 24, 1976

(By Hand)

Honorable Mark A. Costantino  
United States District Judge  
United States Courthouse  
225 Cadman Plaza East  
Brooklyn, New York 11201

Re: MHG *et al.* v. New York City Public  
Development Corporation, *et al.*  
76 Civ. 787 (MC)

My dear Judge Costantino:

During our conference in your Chambers regarding the above matter, certain questions were raised concerning the appropriateness of this Federal proceeding. Since it was a settlement conference, the questions did not receive extended discussion. This letter will set forth the position of plaintiffs with regard to those questions.

1. The point was made that the City of New York is not a "person" subject to suit under Section 1983 of the Civil Rights Act. That rule is not dispositive of this case for the following reasons:

(a) The first paragraph of the first cause of action of the amended complaint alleges specifically that "this claim for declaratory and injunctive relief arises under the Fifth and Fourteenth Amendments of the Constitution of the United States" (Paragraph 8). Federal juris-

*Letter of Plaintiffs' Counsel to Judge Costantino, in  
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diction is specifically invoked pursuant to Sections 1331 and 1343 of Title 28 of the United States Code in that the action arises directly under the Constitution of the United States (Paragraph 5). Moreover, Paragraph 2 of the prayer for relief requests a declaration that certain state and municipal statutory provisions be declared unconstitutional.

(b) The gist of the complaint is that defendants are attempting to take property belonging to plaintiffs without just compensation. In *Joiner v. City of Dallas*, cited at page 5 of plaintiffs' Memorandum of Law, the District Court took jurisdiction of such a case and its decision on the merits was affirmed by the Supreme Court of the United States. Plaintiffs have not pressed their original request to convoke a three judge court; but that is not a requirement for Federal jurisdiction. In every other respect relating to jurisdiction, this case and the *Joiner* case are identical.

(c) The City of New York is only one of three defendants. The other two are the Sheriff and the New York City Public Development Corporation, a corporation organized under the New York Not For Profit Law, both clearly persons subject to suit under Section 1983. Furthermore, by copy of this letter we are advising defendants that, regardless of the outcome of the pending motion for preliminary injunction, plaintiffs will move this Court to add a claim for damages to the complaint and to add the following individual defendants: Richard K. Bernstein; Robert I. Harris; Lloyd Deutsch; Ira Duchan; Irving Sigman and Milton Master.

2. At the conference, counsel for defendants stated that the City would pay relocation benefits with respect to rides located on a certain portion of the premises. I pointed out that a similar statement had previously been

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made by counsel for the defendants in a brief submitted to the Appellate Division, Second Department, and had been repeated on the record at a hearing in the State Supreme Court. However, there has been no response by the New York City Department of Relocation to requests made by plaintiffs more than two months ago for relocation costs to move all the rides on the premises except for a written refusal with respect to a single specific ride.

Plaintiffs are prepared to prove, if given the opportunity, that the Department of Relocation has failed to respond in accordance with the assurances made to various courts by counsel for defendants because the same counsel have been giving contrary advice directly to the the Department of Relocation. Plaintiffs are also prepared to prove that such advice is being given at the direction of defendant New York City Public Development Corporation. Finally, plaintiffs are prepared to prove that they are the only condemnees located on premises condemned by this particular project or any other City project, who have been treated in this manner.

Plaintiffs have submitted affidavits confirming these facts and other facts in dispute. Answering affidavits submitted by defendants do not contradict the facts asserted by plaintiffs, but simply reiterate that New York City Public Development Corporation needs the premises to get on with its work. Plaintiffs are prepared to prove, if given the opportunity, that this assertion is false as well.

At the conference, Mr. Harris, who is Secretary of New York City Public Development Corporation, argued the relocation question passionately, although relocation benefits are not charged to the budget of that corporation and that corporation has no authority with respect to such benefits. This was further confirmation that de-



*Letter of Plaintiffs' Counsel to Judge Costantino, in  
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fendant New York City Public Development Corporation is engaged in a deliberate campaign extending beyond its normal jurisdiction to deprive plaintiffs of equal protection of the laws in order to "take" physically from plaintiffs amusement rides worth millions of dollars without just compensation.

Plaintiffs respectfully request the granting of the preliminary injunction; or a continued stay and a prompt evidentiary hearing to resolve the disputes of fact.

Respectfully yours,

HOWARD M. SQUADRON

HMS/gb

cc: Leonard Olarsh, Esq.  
Corporation Counsel  
1656 Municipal Building  
New York, N. Y. 10007

cc: Robert Harris, Esq.  
Public Development Corporation  
217 Broadway  
New York, N. Y. 10007

**Memorandum and Order by Costantino, D. J., Dated  
May 25, 1976, Appealed From.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

COSTANTINO, D. J.:

Defendants move for an order vacating a temporary restraining order and dismissing the action. The causes of action alleged in the amended complaint were adjudicated in the state courts. This action is, accordingly, barred by the doctrine of *res judicata*. The temporary restraining order is vacated and the case is dismissed. So ordered.

MARK A. COSTANTINO,  
U. S. D. J.

**Judgment.**

A memorandum and order of the Honorable Mark A. Costantino, United States District Judge, having been filed on May 25, 1976, granting the defendants' motion to vacate the temporary restraining order and dismissing the action upon the doctrine of *res judicata* and ordering that the temporary restraining order be vacated and the action dismissed, it is

ORDERED and ADJUDGED that defendants' motion for an order vacating the temporary restraining order and dismissing the action is granted.

Dated: Brooklyn, New York  
May 26, 1976

LEWIS ORGEL  
Clerk



United States Court of Appeals  
For the Second Circuit

MEG Enterprises, Inc., Jay Playland Corp. I.G. Amusement Corp., G & G Ride Corp. J.M.P. Enterprises Inc. Ron Lombardi & Glen Perry d/b/a Eastern Amusement, The Great Adventure Amusement Park Inc. et al.

Plaintiffs-Appellants

against

New York City Public Development Corporation, The City of New York and The Sheriff of the City of New York  
Defendants-Appellees

AFFIDAVIT  
OF SERVICE

On appeal from the United States District Court  
for the Eastern District of New York

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for Squadron Ellenoff & Plesent, being duly sworn,  
deposes and says that he is over the age of 21 years and resides at  
Levittown, New York

That on the 23rd day of June, 1976  
he served the annexed Appendix & Plaintiffs-Appellants Brief upon

W. Bernard Richland  
Corporation Counsel of the City of New York  
Attorney for Defendants-Appellees  
Municipal Building  
New York, New York

in this action, by delivering to and leaving with said attorneys

three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 22 23rd,

day of June, 1976

ROLAND W. JOHNSON  
Notary Public, State of New York  
No. 4509908  
Qualified in Delaware County  
Commission Expires March 30, 1977